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# Report of the United Nations Commission on International Trade Law

## on the work of its twenty-fifth session

## 4–22 May 1992

General Assembly
Official Records • Forty-seventh Session
Supplement No. 17 (A/47/17)

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CONTENTS


| Chapter | | Paragraphs | Page |
|---|---|---|---|
| INTRODUCTION | | 1 - 2 | 1 |
| I. | ORGANIZATION OF THE SESSION | 3 - 10 | 2 |
| | A. Opening of the session | 3 | 2 |
| | B. Membership and attendance | 4 - 7 | 2 |
| | C. Election of officers | 8 | 3 |
| | D. Agenda | 9 | 3 |
| | E. Adoption of the report | 10 | 4 |
| II. | DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS | 11 - 82 | 5 |
| | A. Introduction | 11 - 15 | 5 |
| | B. Discussion of articles | 16 - 72 | 5 |
| | C. Report of the drafting group | 73 - 81 | 19 |
| | D. Adoption of the Model Law and recommendation | 82 | 21 |
| III. | INTERNATIONAL COUNTERTRADE | 83 - 139 | 22 |
| | A. Introduction | 83 - 87 | 22 |
| | B. Discussion of text of draft Legal Guide | 88 - 136 | 22 |
| | C. Decision of the Commission and recommendation to the General Assembly | 137 - 139 | 29 |
| IV. | LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE | 140 - 148 | 30 |
| V. | PROCUREMENT | 149 - 153 | 32 |
| VI. | GUARANTEES AND STAND-BY LETTERS OF CREDIT | 154 - 158 | 33 |
| VII. | INCOTERMS 1990 | 159 - 161 | 34 |
| VIII. | CASE LAW ON UNCITRAL TEXTS (CLOUT) | 162 - 163 | 35 |
| IX. | COORDINATION OF WORK | 164 - 167 | 36 |

CONTENTS (continued)


| Chapter | | Paragraphs | Page |
|---|---|---|---|
| X. | STATUS OF CONVENTIONS | 168 - 175 | 37 |
| XI. | TRAINING AND ASSISTANCE | 176 - 185 | 39 |
| XII. | RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS | 186 - 198 | 42 |
| | A. General Assembly resolution on the work of the Commission | 186 - 189 | 42 |
| | B. UNCITRAL Congress on International Trade Law (New York, 18-22 May 1992) | 190 - 192 | 43 |
| | C. Time period for signing a convention | 193 | 44 |
| | D. Bibliography | 194 | 44 |
| | E. Date and place of the twenty-sixth session of the Commission | 195 | 44 |
| | F. Sessions of the working groups | 196 - 198 | 44 |

Annexes

| | | |
|---|---|---|
| I. | UNCITRAL Model Law on International Credit Transfers | 48 |
| II. | List of documents before the Commission at its twenth-fifth session | 61 |

# INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-fifth session, held in New York from 4 to 22 May 1992.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

# I. ORGANIZATION OF THE SESSION

## A Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-fifth session on 4 May 1992.

## B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 19 October 1988 and on 4 November 1991, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: 1/

Argentina (1998), Austria (1998), Bulgaria (1995), Cameroon (1995), Canada (1995), Chile (1998), China (1995), Costa Rica (1995), Czechoslovakia (1998), Denmark (1995), Ecuador (1998), Egypt (1995), France (1995), Germany (1995), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (1995), Kenya (1998), Mexico (1995), Morocco (1995), Nigeria (1995), Poland (1998), Russian Federation (1995), Saudi Arabia (1998), Singapore (1995), Spain (1998), Sudan (1998), Thailand (1998), Togo (1995), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (1995), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

5. With the exception of Togo, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Algeria, Australia, Belarus, Brazil, Colombia, Côte d'Ivoire, Cuba, Cyprus, Finland, Gabon, Ghana, Haiti, Holy See, Indonesia, Latvia, Libyan Arab Jamahiriya, Malta, Marshall Islands, Netherlands, Namibia, Pakistan, Paraguay, Peru, Philippines, Republic of Korea, Romania, Senegal, Swaziland, Sweden, Switzerland, Tunisia, Turkey, Venezuela and Viet Nam.

7. The session was also attended by observers from the following international organizations:

(a) United Nations organs

International Monetary Fund (IMF)
United Nations Centre on Transnational Corporations

(b) Intergovernmental organizations

Asian-African Legal Consultative Committee (AALCC)
European Community (EC)
Hague Conference on Private International Law
International Institute for the Unification of Private International Law (UNIDROIT)

(c) Other international organizations

Cairo Regional Centre for International Commercial Arbitration
European Banking Federation
Inter-American Bar Association (IABA)
International Chamber of Commerce (ICC)
International Maritime Committee (CMI)

## C. Election of officers 2/

8. The Commission elected the following officers:

Chairman: Mr. José María Abascal Zamora (Mexico)

Vice-Chairmen: Mr. Samir El-Sharkawi (Egypt)
Mr. Abbas Safarian Neamat-Abad (Iran, Islamic Republic of)
Mr. Andrzej Olszowka (Poland)

Rapporteur: Mr. Alfred Duchek (Austria)

## D. Agenda

9. The agenda of the session, as adopted by the Commission at its 467th meeting, on 4 May 199?, was as follows:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. International payments: draft Model Law on International Credit Transfers.

5. Draft Legal Guide on International Countertrade Transactions.

6. Electronic data interchange.

7. New international economic order: draft Model Law on Procurement.

8. International contract practices: draft Uniform Law on International Guaranty Letters.

9. INCOTERMS 1990.

10. Case law on UNCITRAL texts.

11. Coordination of work.

12. Status of conventions.

13. Training and assistance.

14. General Assembly resolutions on the work of the Commission.

15. Other business.

16. Dates and places of future meetings.

17. Adoption of the report of the Commission.

18. Congress on International Trade Law.

## E. Adoption of the report

10. At its 483rd and 484th meetings, on 15 May 1992, the Commission adopted the present report by consensus.

## II. DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS

### A. Introduction

11. The Commission, in conjunction with its decision at the nineteenth session in 1986 to authorize the Secretariat to publish the UNCITRAL Legal Guide on Electronic Funds Transfers 3/ as a product of the work of the Secretariat, decided to begin the preparation of model rules on electronic funds transfers and to entrust the task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments. 4/ The Working Group carried out its work at its sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first and twenty-second sessions (A/CN.9/297, A/CN.9/317, A/CN.9/318, A/CN.9/328, A/CN.9/329, A/CN.9/341 and A/CN.9/344). The Working Group completed its work by adopting the draft text of a Model Law on International Credit Transfers at the close of its twenty-second session after a drafting group had established corresponding language versions in the six languages of the Commission.

12. The text of the draft Model Law as adopted by the Working Group at its twenty-second session was sent to all Governments and to interested international organizations for comment (A/CN.9/347 and Add.1). The secretariat of the Commission prepared a commentary on the draft text (A/CN.9/346).

13. At its twenty-fourth session (1991), the Commission considered articles 1 to 15 of the draft Model Law presented by the Working Group. For lack of time, the Commission suspended its discussion of article 17 and did not discuss articles 16 and 18 of the draft Model Law. It was decided to place the draft Model Law on the agenda of the twenty-fifth session. The text of articles 1 to 15 as resulted from the work of the Commission at its twenty-fourth session and the text of articles 16 to 18 as resulted from the work of the Working Group on International Payments at its twenty-second session are contained in annex I to the report of the Commission on the work of its twenty-fourth session. 5/

14. At its current session, the Commission had before it a note by the Secretariat containing suggestions for the final review of the text (A/CN.9/367).

15. The Commission expressed its appreciation to the Working Group on International Payments and its Chairman, Mr. José María Abascal Zamora (Mexico), for having prepared a draft Model Law on International Credit Transfers that was generally favourably received and regarded as an excellent basis for the discussion in the Commission.

### B. Discussion of articles

#### Article 16

16. The text of draft article 16 as considered by the Commission was as follows:

"Article 16. Liability and damages

"(1) A receiving bank other than the beneficiary's bank is liable to the beneficiary for its failure to execute its sender's payment order in the time required by article 10 (1), if the credit transfer is completed under article 17 (1). The liability of the receiving bank shall be to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. Such liability may be discharged by payment to its receiving bank or by direct payment to the beneficiary.

"(2) If a receiving bank that is the recipient of interest under paragraph (1) is not the beneficiary of the transfer, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

"(3) A receiving bank other than the beneficiary's bank that does not give a notice required under article 7 (3), (4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 4 (6) for the period during which it retains the payment.

"(4) A beneficiary's bank that does not give a notice required under article 9 (2) or (3) shall pay interest to the sender on any payment that it has received from the sender under article 4 (6), from the day of payment until the day that it provides the required notice.

"(5) A receiving bank that issues a payment order in an amount less than the amount of the payment order it accepted shall, if the credit transfer is completed under article 17 (1), be liable to the beneficiary for interest on any part of the difference that is not placed at the disposal of the beneficiary on the payment date, for the period of time after the payment date until the full amount is placed at the disposal of the beneficiary. This liability applies only to the extent that the late payment is caused by the receiving bank's improper action.

"(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 9 (1) or (5).

"(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary.

"(8) The remedies provided in this law do not depend on the existence of a pre-existing relationship between the parties, whether contractual or otherwise. These remedies shall be exclusive, and no other remedy arising out of other doctrines of law shall be available except any remedy that may exist when a bank has improperly executed a payment order or failed to execute a payment order (a) with the intent to cause loss, or (b) recklessly and with knowledge that loss might result."

17. It was noted at the outset that the liability regime set forth in the article was based on the objective failure by a receiving bank to execute a payment order and that it did not rely on any concept such as fault or unjust enrichment on the part of the receiving bank.

Paragraph (1)

18. The Commission recalled that, at its previous session, a proposal was made, but not discussed, for replacing the paragraph by the following provision:

> "(1) A receiving bank other than the beneficiary's bank that fails to comply with its obligations under article 7 (2) is liable to the beneficiary if the credit transfer is completed under article 17 (1). The liability of the receiving bank is to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's failure. However, if the delay concerns only part of the amount of the payment order, the liability shall be to pay interest on the amount that has been delayed."

19. The discussion was based on the proposed text. It was noted that the differences between the proposed text and the text of paragraph (1) presented to the Commission by the Working Group were mainly of a drafting nature. The new third sentence was in substitution for paragraph (5) (see para. 27, below).

20. It was suggested that the receiving bank that had been in delay in the execution of a payment order should be liable to the originator of the payment order in addition to being liable to the beneficiary. It was noted that the interests of the originator were already protected by article 13 (1) when the credit transfer had not been completed. Although that suggestion was not accepted, it was agreed that the Model Law should allow an originator to recover the amount of the interest that it had paid to the beneficiary on the underlying obligation in case of late completion of a credit transfer. It was recalled that a proposal to that effect had been made, but not discussed at the previous session of the Commission. The proposal read as follows:

> "(2 ter) If the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer, the originator may recover such amount, to the extent that the beneficiary would have been entitled to but did not receive interest in accordance with paragraphs (1) and (2), from the originator's bank or the bank liable under paragraph (1). The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or the bank liable under paragraph (1)."

21. After discussion, the Commission adopted the substance of the proposed paragraph (1) and referred it to the drafting group. The Commission also requested the drafting group to review the text of the proposed paragraph (2 ter) for consideration by the Commission at a later stage of its deliberations (see below, para. 79).

Paragraph (2)

22. The Commission approved the substance of paragraph (2) and referred it to the drafting group.

23. The Commission recalled that at its previous session a proposal was made, but not discussed, for adding the following provision after paragraph (2):

> "(2 bis) For the purpose of this law and notwithstanding article 4 (6) a bank is considered to have failed to comply with its obligation under article 7 (2) if a delay is caused by its failure to pay for a payment order. Where payment is to be made by debiting the bank's account with its receiving bank, failure to pay means failure to put funds in the account sufficient to pay for the order". 6/

24. It was noted that the proposed provision established the responsibility of a receiving bank for any delay in the completion of the credit transfer that resulted from the failure of that bank to pay for the payment order sent by that bank in execution of the payment order it had received. Since such a delay could occur only if the receiving bank had not paid for its payment order prior to acceptance of that order by the next receiving bank, the obligation was stated to be notwithstanding article 4 (6), which provided that payment was due from a sender only when the payment order had been accepted. In opposition to the proposal it was stated that it had been decided at the twenty-fourth session of the Commission that it was sufficient for the Model Law to establish (in article 4 (6)) an obligation of the sender to pay the receiving bank upon the acceptance by the receiving bank of the payment order. Furthermore, it had been noted that "it was implicit in [article 7 (2)], which provided that a receiving bank had to issue a payment order that 'contains the instructions necessary to implement the credit transfer in an appropriate manner', that the receiving bank had to issue a payment order that had a reasonable chance of being accepted by the next bank in the credit transfer chain". 7/ After deliberation, the proposed provision was not accepted.

Paragraph (3)

25. A suggestion to merge paragraphs (3) and (4) was not adopted. The Commission approved the substance of paragraph (3) and referred it to the drafting group. It was noted that the reference in the paragraph to paragraph (3) of article 7 should be deleted as a consequence of the decision taken at the twenty-fourth session of the Commission. 8/

Paragraph (4)

26. The Commission approved the substance of the paragraph and referred it to the drafting group. It was noted that, in line with the decision taken at the previous session of the Commission on article 9, 9/ the paragraph should also refer to paragraph (4) of article 9.

Paragraph (5)

27. It was noted that a receiving bank was liable under paragraph (5) only to the extent that the late payment was caused by the bank's improper action, whereas the bank's liability for delay under paragraph (1) was objective. The Commission decided that the standard of liability under paragraph (5) should be the same as the standard of liability under paragraph (1). In view of its adoption of the substance of the proposed revision of paragraph (1) (see para. 19, above), the Commission referred the matter to the drafting group.

Paragraph (6)

28. The Commission approved the substance of the paragraph and referred it to the drafting group.

Paragraph (7)

29. The view was expressed that the paragraph should be deleted. In favour of deletion, it was stated that, consistent with the general principle set forth in article 3, no limitation should affect the freedom of the parties to deviate by agreement from the liability regime contained in article 16. It was also recalled that the definition of "interest" adopted by the Commission at its previous session in article 2 (n) provided that it should be calculated "at the rate and on the basis customarily accepted by the banking community for the funds or money involved". It was stated that the method of calculation was likely to result in uncertainty as to the applicable rate. The view was further expressed that limitations to contractual freedom could only reflect considerations of consumer protection, a matter which should remain outside the scope of the Model Law.

30. The prevailing view, however, was that the substance of the paragraph should be maintained. It was noted that the definition of "interest" in article 2 (n) also provided that the parties could agree on a different method of calculation. The Commission recalled that, in the context of the discussion on the definition of "interest" at its previous session, a concern had been expressed that the reference to the parties' right to vary the provision by agreement could lead to instances in which, in the name of varying interest provisions, a bank would reduce its liability to a non-bank originator or beneficiary in violation of article 16 (7). After discussion, the Commission decided that it should be made clear that a receiving bank could not reduce its liability to a non-bank originator or beneficiary by contracting to pay a low rate of interest. The matter was referred to the drafting group.

Paragraph (8)

31. The Commission approved the first sentence of the paragraph.

32. As to the second sentence, divergent opinions were expressed. Under one view, the sentence should be deleted, thereby leaving to rules outside the Model Law the question of availability of other remedies. Some proponents of that view stated that the Model Law should not preclude a national court from granting a remedy other than a remedy provided by the Model Law. A view was

expressed that exclusivity of the remedies would be contrary to judicial review found in certain systems of law and would therefore be illegal. Under another view, it was necessary to retain the principle of exclusivity of the remedies as well as the exception to that principle contained in the second sentence. It was pointed out that the principle, which made it easier for the banks to foresee the extent of their risk, provided an appropriate balance to a number of provisions in the Model Law that favoured customers of banks (e.g., article 13 on duty to refund, provisions restricting the freedom of banks to limit by contract their liability, or provisions establishing a relatively short time period within which a bank had to act upon a payment order). The prevailing view was to retain the principle of exclusivity as contained in the second sentence.

33. The Commission considered the provision in the second sentence that provided an exception to the exclusivity of remedies when the bank acted intentionally or recklessly. There were different views as to how the exception should be expressed. In support of the current text it was noted that the concepts of "recklessness" and "knowledge" as expressed in paragraph (8) were used with satisfactory results in international transport liability conventions such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). However, a view was expressed that analogies to those conventions were inappropriate, since credit transfers involved very high volumes of transactions at high speed and in other ways were quite different from transport of goods. In opposition to the current text it was further stated that the concepts of "recklessness" and "knowledge" were unclear and would lead to difficulties and divergences in interpretation. In addition, it was feared that minor mistakes or failures could be interpreted as reckless acts, which would defeat the purpose of the exclusivity of remedies. Furthermore, the concept of "knowledge" might open a possibility that general information concerning the underlying transaction given to an employee of the bank might lead to a presumption that the bank had "knowledge that loss might result", a result that was considered unacceptable.

34. Some of those who had objections against the wording of the exception suggested deleting the second sentence, thereby leaving the question of the availability of other remedies to rules other than the Model Law. It was also suggested that clause (b) of the second sentence should be deleted. Others proposed including a wording to the effect that the bank would be deemed to have "knowledge that loss might result" only when specific information concerning the underlying transaction would be given to the bank. The proposal that met with general agreement in the Commission was to replace, subject to review by the drafting group, the word "intent" by the expression "specific intent", to replace the word "knowledge" by the expression "actual knowledge", and to replace the expression "knowledge that loss might result" by the expression "knowledge that loss would be likely to result".

35. The question was raised whether the exclusivity of remedies established by article 16 (8) applied only to a failure to perform an obligation dealt with in article 16 or also to a failure to perform an obligation dealt with elsewhere in the Model Law (e.g., payment obligations under articles 4 (6) and 11 (5) and (6)). The Commission decided that the Model Law should provide a rule on exclusivity of remedies only with respect to obligations in article 16. The drafting group was requested to reformulate article 16 (8) so as to implement the decision.

36. A suggestion was made that a receiving bank that failed to execute its sender's payment order in the time required by article 10 (1) should, in addition to its liability to pay interest on the amount of the payment order, be liable to pay for the expenses incurred for issuance of a new payment order and for reasonable costs of legal representation. It was recalled that those issues had been addressed in earlier drafts of the Model Law. The view was expressed that while the costs incurred for issuance of a new payment order were of minor importance, costs of legal representation might be more significant. After discussion, it was generally felt that there was no need to revise the current text, particularly in view of the fact that it did not preclude national authorities from implementing any law of procedure under which the receiving bank that caused a delay in the execution of the credit transfer might be held liable for costs of legal representation.

37. A proposal was made to exclude in article 16 (8) the liability of the bank when the failure to perform an obligation was due to force majeure. The Commission did not adopt the proposal since it considered that a bank that failed to execute a payment order should pay interest irrespective of the reason for the failure.

## Article 17

38. The text of draft article 17 as considered by the Commission was as follows:

> "Article 17. Completion of credit transfer and discharge of obligation
>
> "(1) A credit transfer is completed when the beneficiary's bank accepts the payment order. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it.
>
> "(2) If the transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.
>
> "(3) A credit transfer shall be considered complete notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law to recover the amount of those charges from the originator."

Paragraph (1)

39. The view was expressed that the paragraph should be deleted since, in order to be consistent with the definition of a "credit transfer" in article 2 (a), completion of the transfer should result from the placing of the funds at the disposal of the beneficiary and not from the acceptance of

the payment order by the beneficiary's bank. It was stated that, in a number of jurisdictions, a credit transfer was considered to be completed only when the funds were placed at the disposal of the beneficiary or credited to its account. Support was also expressed in favour of the deletion of the paragraph on the basis of a concern expressed at the previous session of the Commission that the notion of "completion" of a credit transfer left room for confusion with the question of discharge of the underlying payment obligation due by the originator to the beneficiary. 10/

40. In response, it was stated that the rule provided in the paragraph was necessary to provide certainty as to the time of completion of the credit transfer. It was also stated that, while the time of acceptance of the payment order by the beneficiary's bank was easily determinable, it would often be more difficult to determine the time when the funds were placed at the disposal of the beneficiary or credited to its account since that time would depend on bank practice and might vary with the individual agreements concluded between the beneficiary and its bank. It was further stated that the time when the funds were placed at the disposal of the beneficiary or credited to its account was significant only in the context of the underlying transaction for the purpose of which the credit transfer had been made. It was noted, however, that in other provisions of the Model Law, for example, in articles 5, 6 (2) and 8 (1), one of the methods provided for determining the time of payment or acceptance of a payment order relied on the time when the funds were placed at the disposal of the beneficiary. As regards the concern that the paragraph might have an impact on the discharge of the underlying obligation, it was stated that the purpose of paragraph (1) was merely to establish the moment of completion of a credit transfer and that the question of the discharge of the underlying payment obligation, to the extent it was addressed in the Model Law, was referred to in paragraph (2) (see paras. 43-47 below).

41. The prevailing view was that the paragraph should remain unchanged. It was agreed that the distinction between completion of the credit transfer and discharge of the underlying obligation was sufficiently clear in the current text. It was also agreed that any change in the current rule regarding the time of completion of the credit transfer would have undesirable repercussions on other provisions of the Model Law, for example, the provision contained in article 13 regarding the duty for the originator's bank to refund to the originator any payment received from it in the case where the credit transfer was not completed.

42. With a view to ensuring consistency between paragraph (1) of article 17 and the definition of "credit transfer" contained in article 2 (a), a proposal was made to add to the paragraph the following words:

> "Completion does not otherwise affect the relationship between the beneficiary and the beneficiary's bank."

It was stated that the proposed sentence would make it clear that the credit transfer was distinct from the underlying transaction. After discussion, the Commission adopted the proposal and referred the text of the paragraph to the drafting group.

Paragraph (2)

43. A debate took place as to whether the Model Law should address the issues arising from the underlying transaction. The view was expressed that, as a general matter of policy, the underlying transaction should be kept outside the scope of the Model Law. It was stated that the Model Law should treat a credit transfer as an abstract operation, without regard to the purpose for which the transfer had been made or the legal effect of the transfer on the underlying transaction. Under that view, the paragraph should be deleted since it was the only provision of the Model Law that dealt with the underlying transaction. It was stated that such a provision could be detrimental to the wide acceptability of the Model Law. It was pointed out that international conventions concerning negotiable instruments, including the United Nations Convention on International Bills of Exchange and International Promissory Notes, did not contain any such provision. It was, however, pointed out that a comparison with those conventions was inappropriate because of the significant difference in the subject-matter and the content of the provisions. It was further stated that, in view of the fact that the Model Law had been drafted so as to protect banks against receiving funds at a bank they might not approve of because of its credit risk, a similar protection should be given to the beneficiary. In opposition to that statement, it was noted that the Model Law did not deal with credit risk matters. A further view was that the current text might be interpreted as assuming that the function of a credit transfer was to discharge a monetary obligation. In that connection, it was recalled that, while many legal systems already recognized the credit transfer as an acceptable method of making payment, it was a matter of policy of each State to decide whether a monetary obligation could be discharged by a credit transfer. It was recalled that the Working Group at its twenty-first session had decided that the Model Law should not attempt to deal with the issue of legal tender (A/CN.9/341, para. 12).

44. In favour of the retention of the current paragraph, it was stated that there existed a practical need to coordinate the time of completion of the credit transfer and the time of discharge of the underlying obligation. Under that view, the text was aimed at providing a solution for the difficulties that would arise if the time of completion of the credit transfer and the time of discharge of the underlying obligation were different. It was stated that the possible existence of a time gap between the two would result in an unjust situation where the originator who had accepted to pay by credit transfer would bear the risk of any obstacle to payment that might arise between the time when the credit transfer had been completed and the time when the underlying obligation was discharged. A related view was that, although the Model Law should not contain a provision providing that a credit transfer would constitute discharge of an obligation, it was appropriate for the Model Law to include a provision that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, the Model Law might provide certainty as to the time when such a discharge took place. In that connection, it was observed that the text of the paragraph did not create a new mode of extinction of payment obligations but only provided an operational rule for those cases where the applicable law permitted, and the parties agreed, that an obligation could be discharged by means of a credit transfer.

45. A concern was expressed that the current text of the paragraph might not indicate sufficiently clearly that the beneficiary's bank should be designated by the beneficiary. It was stated that, in the absence of such a designation by the beneficiary, the provision could be interpreted as authorizing the originator to designate the beneficiary's bank. It was also stated that, in view of the fact that the Model Law had been drafted so as to protect banks against receiving funds from sources they might not approve of, a similar protection should be given to the beneficiary. Proposals were made to redraft the text to that effect, for example, by inserting a definition of the beneficiary's bank as "a bank designated by the beneficiary to receive funds as a result of a credit transfer". Another proposed solution was to provide for the right of the beneficiary to reject the funds. In response to the above-stated concern, it was suggested that, in the current text, the words "can be discharged by credit transfer to the account indicated by the originator" should be interpreted as limiting the possibility of discharge to the situation where the account had been indicated by the originator with the agreement of the beneficiary. The Commission agreed with that interpretation and decided to maintain the current text.

46. A proposal was made to add the following words to the text of paragraph (2):

> "Payment under this paragraph is acceptance under paragraph (1) of this article, unless the law applicable to the underlying transaction provides for an earlier time of payment."

The proposal was not adopted by the Commission.

47. Since no consensus was reached on the deletion or on the retention of the paragraph, a suggestion was made that the paragraph should be included in an annex to the Model Law. It was indicated that such location of the paragraph would emphasize its optional nature for national legislators. After discussion, it was decided that the text of the paragraph would be included in a footnote to article 17, with an indication that national legislators might wish to consider incorporating in the national enactment that provision, which related to the discharge of the underlying obligation. The matter was referred to the drafting group.

Paragraph (3)

48. A concern was expressed that the paragraph provided for charges which it did not define. It was pointed out that paragraph (3) did not give or deny the banks any right to deduct charges, nor did it specify the kind of charges that might be deducted.

49. A proposal was made that, after the words "applicable law" in the second sentence of the paragraph, the words "governing the underlying relationship" should be inserted so as to make it clear that the law applicable was the law governing the underlying relationship and not the law governing the credit transfer. It was stated that the fact that it was expressly provided in the second sentence of paragraph (3) that the right of the beneficiary to recover the amount of the charges was not prejudiced by the completion of the credit transfer might imply that other rights arising from the underlying

relationship for which no such express provision was included in the Model Law might be prejudiced.

50. The Commission approved the substance of paragraph (3) with the proposed addition in the second sentence, and referred it to the drafting group.

Pending issues in relation to article 14

51. The Commission recalled that, at its previous session, it had postponed its final decision as to the text of article 14 until it had discussed the issues arising under article 17. 11/ At the current session, it was noted that if a bank failed to issue a new payment order under article 14, the originator would have the option of seeking enforcement of article 14 under the applicable rules of national law or, if the credit transfer was not completed, the originator could claim a refund under article 13. The Commission decided to maintain the text of article 14.

Pending issues in relation to article 5

52. The Commission recalled that, at its previous session, it had postponed its final decision as to the text of subparagraph (b) (ii) of article 5 until it had discussed the issues arising under article 17. 12/ At that session, a view had been expressed that the provisions of article 5 might be inconsistent with the principles contained in article 17. For example, where the sender paid the receiving bank through a third bank, there might be an inconsistency between the time when payment was made to the receiving bank under article 5 (b) (ii) and the time when the obligation was discharged under article 17 (2).

53. At the current session, a view was expressed that no conflict existed between those two provisions since they dealt with different issues: article 5 (b) (ii) dealt with the time when the sender paid the receiving bank while article 17 (2) dealt with the time when the originator discharged its obligation to the beneficiary. It was also noted that in the two articles two different credit transfers were involved and the parties played different roles in each transfer. Therefore, it was argued that no conflict existed between the two articles and no change was necessary.

54. In order to avoid any possibility that the rules contained in subparagraph (b) (ii) of article 5 might be applicable concurrently with the rules contained in paragraph (2) of article 17, a proposal was made to modify the opening words of article 5 to the effect that article 5 would be applicable only "for the purposes of articles 6 and 8". After discussion, the Commission agreed that article 5 should be modified and referred the matter to the drafting group (the drafting group did not deal with the matter in view of the fact that article 17 (2) was placed in a footnote; see para. 47, above).

Misdirected payment order

55. The view was expressed that the provisions on completion of a credit transfer contained in article 17 should make it clear that a credit transfer was not complete where a payment order had been misdirected so that the funds had not reached the beneficiary's bank indicated in the payment order issued

by the originator. After discussion, the Commission approved the substance of the proposal and referred the matter to the drafting group.

## Article 18

56. The text of draft article 18 as considered by the Commission was as follows:

> "Article 18. Conflict of laws
>
> "(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.
>
> "(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4 (1).
>
> "(3) For the purposes of this article,
>
> "(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and
>
> "(b) branches and separate offices of a bank in different States are separate banks."

57. In discussing article 18, different views were expressed as to whether or not a provision about the conflict of laws was needed and desirable.

Paragraph (1)

58. The first sentence of the paragraph enjoyed wide support. It was pointed out, however, that if, as a result of a choice by parties, various payment orders comprising a credit transfer were subject to different national laws, it might become difficult to implement those provisions of the Model Law that required a degree of congruence among rules applicable to individual payment orders. One such provision, for instance, was article 13, which, when the credit transfer was not completed, obligated each bank in the credit-transfer chain to refund funds to its sender bank or to a prior sender.

59. As to the second sentence, divergent views were expressed. Those who opposed retaining the sentence drew attention to possible difficulties that might arise with respect to some provisions of the Model Law when receiving banks participating in a credit transfer were in different States and, as a result of the rule in the second sentence, payment orders would be subject to different national laws (e.g., article 13; see para. 58, above). It was said to be preferable to find conflict-of-laws rules that would determine a single national law applicable to the whole credit transfer. The elaboration of such conflict-of-laws rules continued to be in the work programme of the Hague Conference on Private International Law as a non-priority item, and it was

stated that it would be more appropriate to await the outcome of that work than to retain a rule that might in some situations lead to undesirable results. A delay in establishing a conflict-of-laws solution was said to be acceptable since few court disputes were reported regarding conflict of laws in international credit transfers. In addition, further consideration was necessary to determine whether paper-based credit transfers and electronic transfers, both of which were covered by the Model Law, required different conflict-of-laws rules.

60. It was noted that the Working Group had considered and rejected a "single-law" approach. Those who supported the second sentence considered that, while the ideal solution would be to have a rule determining a single national law for the whole credit transfer, either such a "single-law" rule was not feasible or it would take a long time before international agreement could be reached on such a rule. Even if it were possible to elaborate a single-law conflict-of-laws rule, the applicability of the single law would not be achieved unless all banks participating in a credit transfer were in States that had adopted the conflict-of-laws rule. Until a good number of States had the same or similar substantive law on credit transfers, it was unlikely that many States would agree to a single-law conflict-of-laws rule. With the growing acceptance by States of the Model Law, however, any possible difficulty that might arise from incongruous laws on individual payment orders would be reduced. It was therefore considered useful to retain the second sentence, which provided a workable conflict-of-laws rule. Without the rule in the second sentence, it would be uncertain in many national laws whether a given payment order should be subject to the law of the sender or to the law of the receiving bank. Another merit of the second sentence was that it reduced the possibility of application of a national law that had little or no connection with the case at issue.

61. Since no consensus was reached on the deletion or on the retention of paragraph (1), as well as paragraphs (2) and (3), the Commission decided to place article 18 in a footnote in a form similar to the footnote to article 17 (see para. 47, above). It was indicated that such location of the article would emphasize its optional nature for national legislators.

Paragraph (2)

62. The Commission approved the substance of the paragraph, subject to the deletion of the words "for the purposes of article 4 (1)".

Paragraph (3)

63. The Commission approved the substance of the paragraph.

## Other issues

64. When discussing the text of articles 1 to 15 of the draft Model Law at its previous session, the Commission had decided that a number of issues should be reconsidered after the entire text of the draft Model Law had been considered. In addition, the Secretariat had reviewed the articles already adopted by the Commission to identify potential problems of a technical variety. The problems identified by the Secretariat were discussed in a note

containing suggestions for the final review of the draft Model Law (A/CN.9/367). The Commission at its current session proceeded with the review of those issues.

Definition of "beneficiary's bank"

65. The Commission recalled that, at its previous session, it had agreed to consider the need for a definition of the term "beneficiary's bank". 13/ While at the current session some support was expressed for including in the Model Law a definition of the term, the Commission decided that there was no need for such a definition.

Rule of interpretation

66. The Commission recalled that, at its previous session, it had deferred the decision on the possible insertion in the Model Law of a general provision along the lines of article 7 (2) of the United Nations Convention on Contracts for the International Sale of Goods. 14/ After discussion at its current session, the Commission decided not to insert such a provision.

Drafting suggestions made by the Secretariat

67. The Commission referred drafting suggestions made by the Secretariat (see A/CN.9/367, paras. 5, 8, 12, 15, 22, 33 and 35) to the drafting group.

Application of article 10 (1) to the beneficiary's bank

68. The Commission proceeded with the discussion of the question whether article 10 (1) would apply to the beneficiary's bank and, if it would not, whether there was a need to define execution with regard to the beneficiary's bank (see A/CN.9/367, paras. 16-20). Views were expressed in favour of both the application and the non-application of the article to the beneficiary's bank. After discussion, the Commission decided that article 10 (1) should apply to the beneficiary's bank. Since the text of the paragraph currently led to that result, it was decided to leave it unchanged, notwithstanding a view that the current text could be interpreted as not being applicable to a beneficiary's bank. In the context of that discussion, it was decided that the definition of "execution" in article 2 (1) should be retained and the brackets should be removed. It was pointed out, however, that the beneficiary's bank under article 8 simply accepted or rejected a payment order and then incurred the obligation set forth in article 9. The view was expressed that the word "execution" was apt to cover that situation.

69. It was noted that the value-date rule in article 10 (1 bis) applied to the beneficiary's bank, while the value-date rule in article 10 (1 ter) did not apply to such a bank, although differing views were expressed on the extent to which those paragraphs were capable of being applied to the beneficiary's bank.

Other substantive proposals

70. It was proposed that a provision should be inserted in the Model Law requiring the receiving bank to execute the transfer in the currency or in the unit of account stipulated by the sender. The purpose of the proposal was to

clarify that receiving banks were not allowed, without the consent of the interested party, to convert the funds received into a currency other than that in which the order was denominated. The Commission recalled that the matter had been discussed at its previous session. 15/ After discussion at its current session, the Commission decided that the text of paragraph (2) of article 7 should remain unchanged.

71. In view of the fact that paragraph (8 bis) of article 11 provided that the principles applicable to the revocation of a payment order also applied to amendments of the payment order, a proposal was made that, wherever a provision of the Model Law addressed "payment order or revocation", it should also address the amendment. The Commission adopted the substance of the proposal and referred the matter to the drafting group.

72. A view was expressed in connection with article 4 (2) that there was an uncertainty in the meaning of the expression "comparison of signature" as to whether it included also cases where both signatures and seals were compared. That method was frequently used in the banking practice in some States for the authentication of paper-based credit transfers. In view of the fact that that method was widely used in some States, it was said to be desirable to exclude expressly that case from "comparison of signature". The Commission, recalling the discussion of the issue at the previous session, 16/ decided that the provision should remain unchanged.

## C. Report of the drafting group

73. After consideration of articles 16 to 18 of the draft Model Law, the entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions taken by the Commission and revision to ensure consistency within the text and between language versions. The Commission, at its 481st and 482nd meetings, on 13 May 1992, considered the revised text of the draft Model Law prepared by the drafting group.

74. It was noted that, pursuant to a decision by the Commission (see para. 61, above), the text of article 18 had been placed by the drafting group in a footnote to the title to chapter I and had been labelled article Y. With respect to the opening words to that footnote, the Commission noted that the reason for incorporating the text of article Y into a footnote was the lack of a consensus on its inclusion in the Model Law itself. The text had been placed in a footnote as a drafting suggestion for those States that might wish to consider adding a provision on conflict of laws when enacting the Model Law. The Commission was agreed therefore that the opening phrase of the footnote should read: "The Commission suggests the following text for States that might wish to adopt it'.

75. In the context of the discussion of article Y, it was noted that paragraph (3) (b) established the rule that branches and separate offices of a bank in different States were different banks. It was suggested that the implications of such a rule, for example in the case of insolvency of a bank having branches or offices in different States, might be studied by the Commission at a later session. This issue was stated to be an important banking supervisory concern due to recent events concerning international banking problems.

76. With respect to article 10 (1 bis), a continuing concern was expressed that the issue of value date should not have been dealt with by the Model Law, but that it should rather have been left for consideration by the parties in the context of their contractual relationships.

77. With respect to article 11 (1), the view was expressed that the text should state more clearly that a revocation order should follow the same route as the payment order that was intended to be revoked. After discussion, the Commission was agreed that the text of the draft Model Law was sufficiently clear in that respect.

78. With respect to article 12, the Commission recalled the decision it had made at its previous session to indicate that there would not be any sanction for breach of the duty to assist. 17/ After discussion, the Commission was agreed that, in order to express more clearly the decision, the text of the article should state that a receiving bank was "requested" to assist the originator and each subsequent sending bank in completing the banking procedures of the credit transfer.

79. With respect to the proposed paragraph (2 ter) of article 16, it was noted that the drafting group had placed the paragraph between square brackets in view of the earlier decision of the Commission to reconsider the issue after review of the text by the drafting group (see para. 21, above). The proposal was objected to on the ground that it might interfere with the underlying relationship between the originator and the beneficiary. It was also stated that such a provision might produce the unintended result of encouraging a bank liable under paragraph (1) to delay payment of interest until such time as the originator had paid interest to the beneficiary in accordance with the underlying transaction. In favour of the proposal, it was stated that the proposed paragraph (2 ter) did not interfere with the underlying transaction since it did not establish an obligation for the originator to pay interest but only established a mechanism by which the originator was subrogated to the beneficiary in its rights against the liable bank. After discussion, the Commission adopted the proposal.

80. With respect to paragraph (8) of article 16, it was noted that the paragraph had been separated from the remaining provisions of article 16 by the drafting group and placed in a separate article entitled "Exclusivity of remedies". A drafting proposal was made that the exclusivity of remedies should be defined by reference to "non-compliance with the obligations dealt with in article 16" instead of being defined by reference to "non-compliance with articles 7 or 9", as suggested by the drafting group. After discussion, the Commission agreed that the proposed wording would alter the scope of the provision. The Commission adopted the text of the article as suggested by the drafting group.

81. With respect to article 17, it was noted that, pursuant to a decision by the Commission (see para. 47, above), the text of article 17 (2) had been placed in a footnote. As regards the opening words to that footnote, the Commission was agreed that the reason for placing paragraph (2) in a footnote was the lack of consensus on the inclusion of the text of the paragraph in the Model Law itself. The text had been placed in a footnote as a drafting suggestion for those States that might wish to consider adding a provision related to the discharge of the underlying obligation when enacting the Model

Law. The Commission was agreed therefore that the opening phrase of the footnote should read: "The Commission suggests the following text for States that might wish to adopt it".

## D. Adoption of the Model Law and recommendation

82. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group, 18/ adopted the following decision at its 484th meeting, on 15 May 1992:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

Noting that an increasing number of payments in international trade are carried out by means of credit transfers, particularly as a result of the development of high-speed international electronic funds transfer systems,

Recalling the publication of the Legal Guide on Electronic Funds Transfers prepared by the Secretariat, 3/

Being of the opinion that the establishment of a model law on international credit transfers that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Being convinced that the UNCITRAL Model Law on International Credit Transfers significantly contributes to the establishment of a unified legal framework applicable to all international credit transfers, whether in electronic or in paper-based form,

1. Adopts the UNCITRAL Model Law on International Credit Transfers as it appears in annex I to the report of its current session;

2. Requests the Secretary-General to transmit the text of the UNCITRAL Model Law on International Credit Transfers, together with the travaux préparatoires from the twenty-fourth and twenty-fifth sessions of the Commission, to Governments and other interested bodies;

3. Recommends that all States give due consideration to the UNCITRAL Model Law on International Credit Transfers when they enact or revise their laws, in view of the current need for uniformity of the law applicable to international credit transfers.

## III. INTERNATIONAL COUNTERTRADE

### A. Introduction

83. At its twenty-first session, in 1988, the Commission made a preliminary decision that it would be desirable to prepare a legal guide on drawing up contracts in countertrade transactions. 19/

84. At its twenty-second session, in 1989, the Commission considered the report entitled "Draft outline of the possible content and structure of a legal guide on drawing up international countertrade contracts" (A/CN.9/322) and decided to prepare such a legal guide. 20/

85. At its twenty-third session, in 1990, the Commission considered several draft chapters of the legal guide (A/CN.9/332 and Add.1-7). The discussion in the Commission is reflected in annex I to the report of the Commission on the twenty-third session. 21/ There was general agreement in the Commission with the overall approach taken in preparing the draft chapters, both as to the structure of the legal guide and as to the nature of the description and advice contained therein. 22/ The Commission decided that the Secretariat should complete the preparation of the remaining draft chapters and submit them to the Working Group on International Payments. 23/

86. The Working Group on International Payments, at its twenty-third session in September 1991, considered the remaining draft chapters of the legal guide and draft illustrative provisions (A/CN.9/WG.IV/WP.51 and Add.1-7). The discussion in the Working Group is reflected in document A/CN.9/357. The Working Group requested the Secretariat to revise the draft chapters of the legal guide and present them to the Commission at the twenty-fifth session.

87. The Commission at its current session had before it the following draft materials for the legal guide: the covering report (A/CN.9/362); draft chapters "I. Introduction to legal guide" (A/CN.9/362/Add.1); "II. Scope and terminology of legal guide" (A/CN.9/362/Add.2); "III. Contracting approach" (A/CN.9/362/Add.3); "IV. Countertrade commitment" (A/CN.9/362/Add.4); "V. General remarks on drafting" (A/CN.9/362/Add.5); "VI. Type, quality and quantity of goods" (A/CN.9/362/Add.6); "VII. Pricing of goods" (A/CN.9/362/Add.7); "VIII. Participation of third parties" (A/CN.9/362/Add.8); "IX. Payment" (A/CN.9/362/Add.9); "X. Restrictions on resale of countertrade goods" (A/CN.9/362/Add.10); "XI. Liquidated damages and penalty clauses" (A/CN.9/362/Add.11); "XII. Security for performance" (A/CN.9/362/Add.12); "XIII. Failure to complete countertrade transaction" (A/CN.9/362/Add.13); "XIV. Choice of law" (A/CN.9/362/Add.14); "XV. Settlement of disputes" (A/CN.9/362/Add.15); "Draft illustrative provisions" (A/CN.9/362/Add.16); and "Chapter summaries" (A/CN.9/362/Add.17).

### B. Discussion of text of draft Legal Guide

General discussion

88. The Commission expressed its appreciation to the Working Group on International Payments and its Chairman, Mr. Michael Joachim Bonell of Italy,

for having prepared a draft text of a Legal Guide on International Countertrade Transactions, which was generally favourably received and regarded as an excellent basis for the discussion in the Commission.

89. The Commission reiterated its conviction that the Legal Guide, while not encouraging or discouraging the conducting of international trade through countertrade, would significantly assist parties from all regions of the world to establish fair and balanced contractual relations when they decided to engage in countertrade. The Commission stressed the particular importance of the Legal Guide for developing countries.

90. A number of observations were raised concerning the translation of technical terms into languages other than English. The Commission requested the Secretariat to review the text with a view to ensuring observance of usage in current legal texts and international commerce. Where translation of a term might be misunderstood, it was suggested to indicate in parentheses the term in the original language. Where a term had a special meaning in one language only, it was said to be most appropriate to keep the term in its original version. It was stressed that, as a general policy, it was useful to follow the translations used in previous UNCITRAL legal texts. The following examples of terms whose translation should be reviewed were given: barter (chap. II, para. 14); goods (chap. II, para. 28); standards (chap. VII, para. 11); joint venture (chap. VII, para. 37); trust (chap. IX, para. 10); "swing" (chap. IX, para. 53); "best efforts" (chap. VIII, para. 19); termination (chap. XI, paras. 18 and 28); "hold-harmless" clause (chap. X, para. 24); liquidated damages and penalties (chap. XI); remedies (chap. XIII, sect. B).

Chapter I. Introduction to Legal Guide (A/CN.9/362/Add.1)

91. The Commission agreed to insert in paragraph 2, after the third sentence, the following sentence: "Mr. Michael Joachim Bonell of Italy served as chairman of the sessions of the Commission and the Working Group devoted to the drafting of the Legal Guide." Subject to that modification, the chapter was approved.

Chapter II. Scope and terminology of Legal Guide (A/CN.9/362/Add.2)

Section A

92. As a consequence of the Commission's decision to insert in chapter VI three paragraphs concerning commitments to invest (see para. 99, below), the Commission decided to insert in the third and fourth sentences of paragraph 2 a reference to investment. Subject to that modification, the Commission approved section A.

Sections B, C and D

93. The Commission approved the texts of the sections.

Section E

94. The Commission decided to include in paragraph 16 a reference to the fact that the supply of a production facility usually required bank financing. Subject to that modification, the Commission approved section E.

Chapter III. Contracting approach (A/CN.9/362/Add.3)

95. The Commission adopted the proposal to refer in the first sentence of paragraph 4 not only to the quantity of goods but also to the quality of goods. Subject to that modification, the Commission approved the chapter.

Chapter IV. Countertrade commitment (A/CN.9/362/Add.4)

Sections A, B, C, D and F

96. It was decided to place the discussion contained in section F, "Stage when commitment fulfilled", before section C, "Time period for fulfilment of the countertrade commitment". Subject to that modification, the sections were approved.

Section E

97. It was agreed to insert in paragraph 33, at the end of the first sentence, text along the following lines: "or the extent to which the components of the purchased goods were produced locally ('local content' or 'local value added')". Subject to that modification, the section was approved.

Chapter V. General remarks on drafting (A/CN.9/362/Add.5)

98. The chapter was approved.

Chapter VI. Type, quality and quantity of goods (A/CN.9/362/Add.6)

99. The Commission decided to add after paragraph 23 the following text:

"23 bis. In some countertrade transactions, in particular in some indirect offset transactions, it is agreed that the exporter, i.e. the party committed to purchase goods, may earn fulfilment credit by investment of capital. Sometimes it is agreed that the exporter must fulfil a specified part of the countertrade commitment through investment.

"23 ter. It is advisable for the countertrade agreement to define the type of investments that will count towards fulfilment of the countertrade commitment. Eligible investments may be defined, for example, by the size of the capital and the form in which it is to be invested; the jurisdiction in which the recipient of the investment must be incorporated or have its place of business; the type of business activities that must result from the investment; the markets in which products or services of the recipient of the investment are to be offered; the type of technology to be used by the recipient of the investment; or the ownership of the technology.

"23 quater. The parties may consider whether the fulfilment credit granted for an eligible investment is to be equal to or different from the amount of the investment (see chapter IV, 'Countertrade commitment', paragraphs 31 to 34). Furthermore, it may be considered whether, in counting the amount of the investment towards fulfilment of the countertrade commitment, any interest or dividend paid to a creditor or investor is to be deducted."

100. Subject to the foregoing addition, the Commission approved the chapter.

Chapter VII. Pricing of goods (A/CN.9/362/Add.7)

101. The Commission approved the chapter.

Chapter VIII. Participation of third parties (A/CN.9/362/Add.8)

102. The Commission approved the chapter.

Chapter IX. Payment (A/CN.9/362/Add.9)

103. The Commission approved the chapter.

Chapter X. Restrictions on resale of countertrade goods (A/CN.9/362/Add.10)

104. The Commission approved the chapter.

Chapter XI. Liquidated damages and penalty clauses (A/CN.9/362/Add.11)

Title

105. A question was raised as to the appropriateness of referring in the title to both liquidated damages clauses and to penalty clauses. The concern behind that question was that drawing a distinction between the two types of clauses might be confusing to readers in legal systems that did not distinguish between the two types of clauses. It was suggested that the title might be modified to read "Agreed sum due upon failure of performance", based on the terminology used by the Commission in the Uniform Rules on Contract Clauses for an Agreed Sum due upon Failure of Performance. It was pointed out, however, that the present title was intended to recognize the distinction made in some legal systems between liquidated damages, as pre-assessments of the extent of damages due for failure to perform, and penalty clauses as sanctions for failure to perform. It was also noted that the same title was used in the analogous chapter in the UNCITRAL Legal Guide on Drawing up Contracts for the Construction of Industrial Works (hereinafter referred to as the "Legal Guide on Construction") and that uncertainty might arise from a divergence in this respect between the two legal guides. Accordingly, after deliberation, the Commission decided to retain the title in its present form.

Section A

106. No objections were raised to a proposal to invert the order of paragraphs 1 and 2.

107. The Commission considered whether it would be appropriate to attempt to define and distinguish liquidated damages and penalty clauses beyond what was contained in paragraph 1. The generally held view was that this would not be appropriate, in particular because a more extended discussion of liquidated damages and penalty clauses would be outside the focus of the Legal Guide, which was confined to issues specific to countertrade.

108. It was suggested that mention should be made in paragraph 6 of the possibility of compensating for non-performance by the delivery of goods. Such an approach might be helpful when the obligated party was short of currency. The Commission was of the view that the generally accepted function of liquidated damages and penalty clauses was to provide monetary compensation. Nevertheless, the Commission agreed that it would be useful for the Legal Guide to point out that, in the event of a currency shortage on the part of the party obligated to pay the agreed sum, the parties were not precluded from agreeing that the obligation to pay the agreed sum could be liquidated by delivery of goods in an agreed quantity and quality.

109. The Commission agreed to a suggestion that mention should be added, in paragraph 7 or 12, of the requirement in some legal systems that the amount stipulated in the liquidated damages or penalty clause may not exceed the amount of the underlying obligation, and of the prohibition in some legal systems of claims for damages for failure to perform in cases covered by penalty clauses.

110. The Commission approved section A, subject to the agreed-upon changes.

Sections B through F

111. The Commission approved sections B through F, subject to the repositioning of paragraph 21 to follow paragraph 23.

Chapter XII. Security for performance (A/CN.9/362/Add.12)

112. The Commission approved the chapter.

Chapter XIII. Failure to complete countertrade transaction (A/CN.9/362/Add.13)

Sections A, C and D

113. The Commission approved the sections.

Section B

114. The Commission approved the section, subject to the deletion of the last sentence of paragraph 9.

Chapter XIV. Choice of law (A/CN.9/362/Add.14)

Section A

115. The Commission agreed to reformulate paragraph 2 as follows: "Under the rules of private international law (in some legal systems referred to as 'conflict-of-laws' or 'choice-of-law' rules) of most jurisdictions, the

parties are permitted by agreement to choose the applicable law. Under some laws there are, however, some restrictions on that choice. If the parties do not choose the applicable law, the rules of private international law of the forum will determine which law governs the legal relationship."

116. It was agreed to replace the second sentence of paragraph 5 by the following: "For example, most States do not allow freedom of choice with respect to the question of transfer of ownership of goods or disposition of funds held in a bank."

117. Subject to the above changes, the Commission approved the section.

Section B

118. The Commission agreed to delete in the sixth sentence of paragraph 10 the words "unless the parties have chosen the applicable law". The Commission also agreed to delete the penultimate sentence in paragraph 10.

119. The Commission decided to replace in the fourth sentence of paragraph 12 the words "Under other systems" by the words "Under most systems".

120. The Commission accepted the proposal to mention in paragraph 15 that some States did not recognize the type of agreement referred to in the first sentence of paragraph 15, and that under the law of those States the transaction would be governed by the national law determined pursuant to the rules of private international law.

121. It was agreed to replace in the first sentence of paragraph 16 the words "In many national laws" by the words "In most national laws".

122. Subject to the above changes, the Commission approved the section.

Sections C and D

123. The Commission approved the sections.

Chapter XV. Settlement of disputes (A/CN.9/362/Add.15)

Section A

124. The Commission agreed with the proposal to delete in the fourth sentence of paragraph 2 the word "impartial".

125. The Commission agreed that the penultimate sentence of paragraph 17 should refer to paragraph 7, which contained further discussion on rules in some States limiting the freedom of parties to enter into an arbitration agreement.

Sections B and C

126. The Commission approved the sections.

Section D

127. With respect to the discussion in the underlined sentence in paragraph 16, the Commission decided that the sentence should be reformulated so as to avoid an erroneous impression that an arbitral tribunal could enforce the remedy of specific performance.

128. The Commission agreed to delete the words "In general" at the beginning of the first sentence of paragraph 18.

129. The Commission agreed to add in the second sentence of paragraph 21, after the words "is not enforceable", the words "as such", or words of the same meaning, so as to make it clear that the award, while not being enforceable in expedited proceedings similar to the proceedings for the enforcement of judicial decisions, was binding on the parties as a contract.

130. As to the discussion in paragraph 36, it was pointed out that article I(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) made it possible to limit the applicability of the Convention to awards made in States parties to the Convention. The Commission was agreed that, in view of the foregoing, the question whether a State was a party to the Convention was one of the factors in choosing the place of arbitration and that that factor should be reflected in paragraph 36.

131. The Commission decided that in paragraph 29 greater emphasis should be placed on the useful features of the UNCITRAL Arbitration Rules.

132. Subject to the foregoing modifications, the Commission approved the section.

Sections E and F

133. The Commission approved the sections.

Draft illustrative provisions (A/CN.9/362/Add.16)

134. The Commission decided to delete, in the text of the footnote to paragraph 21 in chapter XIII, the words "physical or legal". Subject to that modification, the Commission approved the draft illustrative provisions.

Chapter summaries (A/CN.9/362/Add.17)

135. The Commission requested the Secretariat to revise the chapter summaries and reflect in them, where necessary, the changes made in the chapters of the Legal Guide. Subject to those changes to be made, the Commission approved the chapter summaries.

Index

136. The Commission noted that the Secretariat would prepare an index to the Legal Guide.

## C. Decision of the Commission and recommendation to the General Assembly

137. The Commission, at its 479th meeting on 12 May 1992, adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,

Noting that an appreciable share of international trade is carried out through countertrade transactions,

Being of the opinion that a legal guide on contractual issues in international countertrade transactions will be helpful to parties involved in such transactions, and in particular to parties from developing countries,

1. Adopts the UNCITRAL Legal Guide on International Countertrade Transactions;

2. Invites the General Assembly to recommend the use of the Legal Guide for international countertrade transactions;

3. Requests the Secretary-General to take effective measures for the widespread distribution and promotion of the use of the Legal Guide.

138. The Secretariat was requested to edit the text of the Legal Guide adopted by the Commission and to publish it expeditiously. The Commission expressed agreement with statements emphasizing that, in view of the usefulness of the Legal Guide in all regions of the world, the secretariat of the Commission and other relevant units of the United Nations Secretariat should take effective measures to publicize the Legal Guide world wide.

139. The Commission decided that the publication containing the Legal Guide should set forth an invitation to readers to communicate to the Secretariat their comments on the Legal Guide.

## IV. LEGAL PROBLEMS OF ELECTRONIC DATA INTERCHANGE

140. At its twenty-fourth session, in 1991, the Commission was agreed that the legal issues of electronic data interchange (EDI) would become increasingly important as the use of EDI developed and that the Commission should undertake work in that field. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a Working Group. 24/

141. At its current session, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). As requested by the Commission, the report contained recommendations for future work by the Commission with respect to the legal issues of EDI. The report suggested that any future work by the Commission in the field should be aimed at facilitating the increased use of EDI. The report also noted that the deliberations of the Working Group had made it clear that there existed a need for legal norms to be developed in the field of EDI. The report further suggested that the review of legal issues arising out of the increased use of EDI had also demonstrated that among those issues some would most appropriately be dealt with in the form of statutory provisions. Examples of such issues included: formation of contracts; risk and liability of commercial partners and third-party service providers involved in EDI relationships; extended definitions of "writing" and "original" to be used in an EDI environment; and issues of negotiability and documents of title (ibid., para. 129).

142. The report also suggested that other issues arising from the use of EDI were not ready for consideration in the context of statutory provisions and would require further study or further technical or commercial developments. While it was generally felt by the Working Group that it was desirable to seek the high degree of legal certainty and harmonization provided by the detailed provisions of a uniform law, it was also felt that care should be taken to preserve a flexible approach to some issues where legislative action might be premature or inappropriate. As an example of such an issue, it was stated that it might be fruitless to attempt providing legislative unification of rules on evidence applicable to EDI messaging. It was stated in the report that, on some such issues, the Commission might deem it appropriate to undertake the preparation of legal rules, legal principles or recommendations (ibid., para. 130).

143. The Working Group recommended that the Commission should undertake the preparation of legal norms and rules on the use of EDI in international trade. The Working Group was agreed that such norms and rules should be sufficiently detailed to provide practical guidance to EDI users as well as to national legislators and regulatory authorities. The Group also recommended that the Commission, while it should aim at providing the greatest possible degree of certainty and harmonization, should not, at that stage, make a decision as to the final form in which those norms and rules would be expressed (ibid., para. 131).

144. As regards the possible preparation of a standard communication agreement for world-wide use in international trade, the Working Group was agreed that, at least currently, it was not necessary for the Commission to develop a

standard communication agreement. However, the Working Group noted that, in line with the flexible approach recommended to the Commission concerning the form of the final instrument, situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (ibid., para. 132).

145. The Working Group reaffirmed the need for close cooperation between all international organizations active in the field. It was agreed that the Commission, in view of its universal membership and general mandate as the core legal body of the United Nations system in the field of international trade law, should play a particularly active role in that respect (ibid., para. 133).

146. At its current session, the Commission expressed its appreciation for the work accomplished by the Working Group. In line with the suggestions of the Working Group, the Commission was agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed, along the lines suggested by the Working Group, that no decision should be taken at this early stage as to the final form or the final content of the legal rules to be prepared by the Commission. In particular, it was agreed that, while some issues would most appropriately be dealt with in the form of statutory provisions, other issues might more appropriately be dealt with through model contractual clauses.

147. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (ibid., paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange.

148. The Commission also reaffirmed the need for active cooperation between all international organizations active in the field. The Commission decided that the Secretariat should continue to monitor legal developments in other organizations such as the Economic Commission for Europe (ECE), the European Communities and the International Chamber of Commerce (ICC), facilitate the exchange of relevant documents between the Commission and those organizations and report to the Commission and its relevant Working Groups on the work accomplished within those organizations.

## V. PROCUREMENT

149. At its nineteenth session, in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order. 25/ The Working Group commenced its work on the topic at its tenth session (1988), and continued work at the eleventh, twelfth, thirteenth and fourteenth sessions; the reports of those sessions are contained in documents A/CN.9/315, A/CN.9/331, A/CN.9/343, A/CN.9/356 and A/CN.9/359, respectively.

150. At its current session the Commission had before it the reports of the Working Group on the work of its thirteenth session, held in New York from 15 to 26 July 1991 (A/CN.9/356), and of its fourteenth session, held at Vienna from 2 to 13 December 1991 (A/CN.9/359). The report of the fourteenth session indicated that the Working Group was nearing the completion of its work on the draft Model Law (A/CN.9/359, para. 248).

151. The Commission noted with approval that it was the intention of the Working Group to submit the draft Model Law to the twenty-sixth session of the Commission in 1993 for finalization and adoption and that, in that light, the Working Group expected to complete work on the draft Model Law at its fifteenth session (scheduled to take place in New York from 22 June to 2 July 1992). The Commission agreed to a request from the Working Group to authorize a sixteenth session of the Working Group, to be held at Vienna from 5 to 16 October 1992, in the event that the Working Group did not complete its work at the fifteenth session. It was noted that, even if a sixteenth session were to prove necessary, sufficient time would remain to circulate the draft Model Law for comments prior to the twenty-sixth session of the Commission.

152. The Commission accepted the recommendation of the Working Group that priority should be given to the preparation of a commentary aimed at giving guidance to legislatures preparing legislation based on the Model Law, but that the preparation of that commentary should not delay the completion of the Model Law. The Commission also noted that the draft commentary would be prepared by the Secretariat and that a small and informal ad hoc working party of the Working Group would be convened to review the draft commentary.

153. Noting that the preparation of a Model Law on procurement was particularly timely and urgently needed in view of the fact that an increasing number of States were considering reform of their procurement laws, the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously, with a view to consideration of the draft Model Law by the Commission at its next session.

## VI. GUARANTEES AND STAND-BY LETTERS OF CREDIT

154. The Commission, at its twenty-second session, held in 1989, decided that work on a uniform law on guarantees and stand-by letters of credit should be undertaken, and entrusted that task to the Working Group on International Contract Practices. 26/

155. The Working Group had commenced its work on the topic at its thirteenth session by considering possible issues of a uniform law. At its fourteenth and fifteenth sessions, the Working Group had examined draft articles 1 to 7 of the uniform law and further issues to be dealt with in a uniform law. The reports of those sessions of the Working Group are contained in documents A/CN.9/330, A/CN.9/342 and A/CN.9/345.

156. At its current session, the Commission had before it the reports of the Working Group on the work of its sixteenth and seventeenth sessions (A/CN.9/358 and A/CN.9/361). The Commission noted that the Working Group had during its sixteenth session examined draft articles 1 to 13 and during its seventeenth session draft articles 14 to 27 of the uniform law prepared by the Secretariat.

157. The Commission noted that the Working Group had requested the Secretariat to prepare, on the basis of the deliberations and conclusions of the Working Group, a revised draft of articles 1 to 27 of the uniform law. The Commission further noted that, when discussing the appropriateness of including provisions on conflicts of law and jurisdiction in the uniform law, the Working Group had requested the Secretariat to continue consulting with the Hague Conference on Private International Law on possible methods of cooperation in that field.

158. The Commission expressed its appreciation for the progress made by the Working Group so far and requested it to continue carrying out its task expeditiously.

## VII. INCOTERMS 1990

159. At its twenty-fourth session, in 1991, the Commission had considered a request from the Acting Secretary-General of the International Chamber of Commerce (ICC) that the Commission should consider endorsing INCOTERMS 1990 for world-wide use. In order to allow consideration of that request, the Commission had before it the text of INCOTERMS 1990 (A/CN.9/348). It was recalled that the Commission, at its second session in 1969, had endorsed INCOTERMS 1953. Reference was made to the importance of INCOTERMS as a widely used practical tool and to the need for wider awareness of INCOTERMS. Furthermore, appreciation was expressed for the efforts made by ICC to revise INCOTERMS in order to stay abreast of changes in transportation techniques and trade documentation. However, while at the twenty-fourth session several delegations had indicated their desire to endorse the text of INCOTERMS, some delegations had indicated that, owing to the fact that late publication of document A/CN.9/348 had prevented them from carrying out the consultations required prior to endorsement, they had not been prepared to endorse the text of INCOTERMS at that session. The Commission regretfully felt obliged to postpone consideration of endorsement until the current session.

160. At its current session, the Commission was agreed that INCOTERMS 1990 succeeded in providing a modern set of international rules for the interpretation of the most commonly used trade terms in international trade. The Commission noted with appreciation that the new method of presenting INCOTERMS 1990 facilitated their reading and understanding. Several delegations reported that INCOTERMS 1990 were already widely used in their countries. The Commission expressed its appreciation of the continuing cooperation which the Commission had enjoyed with ICC.

161. At its 480th meeting, on 12 May 1992, the Commission adopted the following decision endorsing INCOTERMS 1990:

> The United Nations Commission on International Trade Law,
>
> Expressing its appreciation to the International Chamber of Commerce for having transmitted to it the revised text of INCOTERMS, which was approved by the Commercial Practices Commission of the International Chamber of Commerce and entered into force on 1 July 1990, and for requesting the Commission to consider endorsing INCOTERMS 1990 for worldwide use,
>
> Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by revising INCOTERMS to take account of changes in transportation techniques and to adapt the terms to the increasing use of electronic data interchange,
>
> Noting that INCOTERMS constitute a valuable contribution to the facilitation of international trade,
>
> Commends the use of INCOTERMS 1990 in international sales transactions.

## VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

162. At its twenty-first session (1988), the Commission decided to establish a system for collecting and disseminating information on court decisions and arbitral awards relating to normative texts emanating from the work of the Commission. 27/ At the current session it was reported that the Secretariat had established the system. It was explained that the system relied on national correspondents designated by those States adhering to a Convention or having enacted legislation based on a Model Law. The Commission was informed that the features of the system were explained in detail in the User Guide that would be published together with the first batch of abstracts of court decisions, which related to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and the UNCITRAL Model Law on International Commercial Arbitration (1985).

163. The Commission noted with appreciation and satisfaction that the case collection system had been established and congratulated the national correspondents and the Secretariat on the work that had been done so far in relation to the establishment of the system. The Commission further urged States to cooperate with the Secretariat in the operation of the system, and in particular to appoint national correspondents, on whose work the operation of the system was dependent.

## IX. COORDINATION OF WORK

164. The Commission had before it a note by the Secretariat on assistance by multilateral organizations and bilateral aid agencies in the modernization of commercial laws in developing countries (A/CN.9/364). The note reported that a number of multilateral organizations and bilateral aid agencies were involved in rendering assistance in activities whose objective was the modernization of commercial law in developing countries. The assistance rendered typically took the form of the provision of experts, as well as of funding to be used in the execution of projects. It was further noted that those activities concentrated on the modernization and development of legislation in the following areas: investment laws; intellectual property law; maritime legislation; and laws and regulations in areas such as taxation, insurance, customs, procurement and export and import trade.

165. The note by the Secretariat recommended that, in view of the fact that the activities of multilateral organizations and bilateral aid agencies could play a significant role in the development of international trade law and that that work had implications for the harmonization of international trade law, the Commission might wish to request the Secretariat to continue to monitor the work of those organizations in that area. Further, the Commission might wish to recommend to those multilateral organizations and bilateral aid agencies thus far not involved in that kind of work to consider taking a more active part in such activities and to consider including such activities in the terms of reference of their work. In addition, the Commission might wish to urge that there should be greater cooperation and consultation between UNCITRAL and the multilateral organizations and bilateral aid agencies when those organizations carried out projects designed to modernize commercial law in developing countries.

166. A concern was expressed that the type of note before the Commission should not mean that the Secretariat might not in the future prepare reports on the current activities of other organizations related to the harmonization and unification of international trade law such as those that had been prepared in the past. It was explained that the preparation of such "current activities" reports had taken place at intervals and that such a report would again be prepared in the near future. It was noted that, in between such reports, the Secretariat had in the past prepared reports that focused on special issues and that the note before the Commission was one such special report.

167. The Commission noted with appreciation the efforts of the Secretariat to monitor the activities of multilateral organizations and bilateral aid agencies relating to the modernization of commercial laws in developing countries.

## X. STATUS OF CONVENTIONS

168. The Commission considered the status of signatures, ratifications, accessions and approvals of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) ("the Limitation Convention"), the Protocol amending the Limitation Convention (Vienna, 1980), the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ("the Hamburg Rules"), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) ("the United Nations Sales Convention"), the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) ("the UNCITRAL Bills and Notes Convention") and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991) ("the United Nations Terminal Operators Convention"). The Commission also considered the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). In addition, the Commission took note of the jurisdictions that had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration ("the UNCITRAL Model Arbitration Law"). The Commission had before it a note by the Secretariat on the status of those Conventions and of the Model Law as at 23 April 1992 (A/CN.9/368).

169. The Commission was pleased to note that, since the report submitted to the Commission at its twenty-fourth session (1991), Romania and Uganda had ratified the Limitation Convention and its amending Protocol. As a result of those actions, 10 States were currently parties to the Limitation Convention as amended by the Protocol, while 3 States were parties to the unamended Convention.

170. The Commission took pleasure in noting that one additional State, namely Zambia, had acceded to the Hamburg Rules, bringing the total number of parties to 20. As a result, the Convention would come into force for all parties thereto on 1 November 1992.

171. With respect to the United Nations Sales Convention, the Commission noted with satisfaction that Ecuador and Uganda had become parties to the Convention, and that Canada had, to this point, extended the application of the Convention to all Provinces and Territories except Yukon.

172. The Commission noted with pleasure the accession of Bangladesh, Latvia and Uganda to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

173. The Commission noted with pleasure that the United States of America had signed the United Nations Terminal Operators Convention.

174. With respect to the UNCITRAL Arbitration Model Law, the Commission noted with pleasure that legislation based on the Model Law had been enacted in Finland.

175. Representatives and observers of a number of States reported that official action was being taken with a view to adherence to the United Nations Sales Convention, the Limitation Convention as amended by the Protocol, the Hamburg Rules, the UNCITRAL Bills and Notes Convention, and to adoption of legislation based on the UNCITRAL Model Arbitration Law.

## XI. TRAINING AND ASSISTANCE

176. The Commission had before it a note by the Secretariat that set out the activities that had been carried out in respect of training and assistance during the period between the twenty-fourth and the current session of the Commission as well as possible future activities in that field (A/CN.9/363). The note indicated that since the statement of the Commission at its twentieth session (1987), "that training and assistance was an important activity of the Commission and should be given a higher priority than it had in the past", 28/ the Secretariat had endeavoured to devise a more extensive programme of training and assistance than had been previously carried out. In doing so the Secretariat had kept in mind the decision of the Commission at its fourteenth session in 1981, that a major purpose of the training and assistance activities should be the promotion of the texts that had been prepared by the Commission. 29/

177. As announced to the twenty-fourth session of the Commission in 1991, 30/ a regional seminar on international trade law, organized jointly by the UNCITRAL secretariat and the South Pacific Forum secretariat, was held at the Forum secretariat headquarters in Suva, Fiji from 21 to 25 October 1991. The seminar was organized for the South Pacific States. Sixteen participants, who were mainly senior government officials and therefore well placed in their respective countries to influence decisions relating to acceptance of UNCITRAL texts, attended the seminar. They were from the following States members of the South Pacific Forum: Australia, Cook Island, Fiji, Kiribati, Micronesia (Federated States of), Nauru, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Vanuatu.

178. The Forum secretariat provided the facilities necessary for the holding of the seminar, which was financed by a grant from the Government of Australia and by funds from the UNCITRAL Trust Fund for Symposia. Australia further supported the seminar by providing two lecturers; the other lecturers were a Canadian consultant, a lawyer from the region and two members of the secretariat of the Commission. The seminar considered the conventions and other legal texts prepared by the Commission.

179. A seminar on international commercial arbitration was held in Mexico City from 20 to 21 February 1992. The seminar was jointly organized by the Mexican Ministry of External Relations and the secretariat of the Commission. Lectures were given by four Mexican experts, a consultant and a member of the secretariat of the Commission. The lectures were on various legal texts, including the UNCITRAL Model Arbitration Law and the UNCITRAL Arbitration Rules, and on various issues of international arbitration practice. The seminar was attended by about 80 ministry officials, practitioners and law teachers.

180. The Commission was informed that the Secretariat expected to intensify even further its efforts to organize or co-sponsor seminars and symposia on international trade, especially for developing countries. It was reported that, as announced at the twenty-fourth session of the Commission 31/ and in view of the interest shown in the Fourth UNCITRAL Symposium and the advantages of holding symposia in connection with the sessions of the Commission when they were held at the location of the Commission's secretariat at Vienna, it

was intended to organize the Fifth UNCITRAL Symposium on International Trade Law on the occasion of the twenty-sixth session of the Commission, in June 1993.

181. It was reported that the Secretariat had received requests to hold seminars from various States in Africa, Asia and Latin America and that tentative plans had been made for organizing in November 1992 a series of national seminars in Indonesia, the Philippines and possibly Malaysia and Thailand. It was also reported that another such series might next be organized in some countries of Latin America. It was suggested that the Secretariat should consider extending that series of seminars to Africa. It was explained that the Secretariat planned to extend such seminars to Africa depending on the availability of funds. It was further explained that the Secretariat had held seminars in Africa in previous years: Lesotho (1988), Guinea (1990) and Cameroon (1991).

182. The Secretariat was of the view that country seminars were relatively cost-effective from a financial point of view, since the only expense was normally the travel cost of lecturers. However, country seminars required a significantly greater expenditure of time for each country than did regional seminars. Therefore an appropriate balance between regional seminars and country seminars would depend to some degree on the balance between the financial resources available to the Secretariat and the amount of time that could be devoted to the organization and holding of such seminars.

183. The Secretariat reported that awareness of the UNCITRAL legal texts among many countries, in particular developing countries, was resulting in increasing requests for technical assistance from individual Governments and regional organizations. The Secretariat had been requested on a number of occasions to consult with individual countries during their consideration of UNCITRAL texts. In addition, requests from regional organizations on matters that ranged from review of laws of member States with a view to harmonization and possible unification to provision of a consultant had been received.

184. It was noted that the programme of training and assistance, in particular the holding of regional seminars, depended on the continued availability of sufficient financial resources. It was pointed out that no funds for the travel of participants and lecturers had been provided for in the regular budget. As a result, expenses had to be met by voluntary contributions to the UNCITRAL Trust Fund for Symposia. The contributions made to the UNCITRAL Trust Fund for Symposia on a multi-year basis had been of particular value because they had permitted the Secretariat to plan and finance the programme without the need to solicit funds from potential donors for each individual activity. Such contributions had been received from Canada and Finland. In addition, the annual contribution from Switzerland had been used for the seminar programme. Other financial contributions had been made by Australia and France. A view was expressed that the Commission should look at the possibility of raising funds from other sources such as foundations and the private sector to support its training and assistance programme. It was further suggested that Governments in developing countries should be encouraged to seek funding to supplement the efforts of UNCITRAL.

185. The Commission expressed its appreciation to all those who had participated in the organization of UNCITRAL seminars, and in particular to those that had given financial assistance to the programme of seminars and the UNCITRAL Trust Fund for Symposia. The Commission also expressed its appreciation to the Secretariat for its efforts to conduct an expanded programme of seminars and symposia.

## XII. RELEVANT GENERAL ASSEMBLY RESOLUTIONS AND OTHER BUSINESS

### A. General Assembly resolution on the work of the Commission

186. The Commission took note with appreciation of General Assembly resolution 46/56 of 9 December 1991 on the report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session. In particular, the Commission took note of the request by the General Assembly that the Fifth Committee, in order to ensure full participation by all Member States, consider granting travel assistance, within existing resources, to the least developed countries that are members of the Commission, as well as, on an exceptional basis, to other developing countries that are members of the Commission at their request, in consultation with the Secretary-General, to enable them to participate in the sessions of the Commission and its working groups. The Commission further took note of the recommendation of the General Assembly, expressed in paragraph 3 of resolution 46/56 B, that the Commission rationalize the organization of its work and consider, in particular, the holding of consecutive meetings of its working groups, and of the Assembly's request, in paragraph 4 of the same resolution, that the Commission submit a report on the implementation of the resolution to the Assembly at its forty-seventh session.

187. The Commission considered the recommendation of the General Assembly contained in paragraph 3 of resolution 46/56 B. It was observed that the Commission had on two previous occasions, at its twenty-first session (1988) and at its twenty-third session (1990), considered the rationalization of its working methods, including the issue of whether the holding of consecutive meetings for its working groups was practicable and whether it could result in savings on the cost of the travel expenses for delegations to UNCITRAL meetings. The Commission had concluded that the holding of consecutive meetings for its working groups was impracticable. It was noted that because of the nature of the work assigned to each working group, delegations were normally composed of different experts. The holding of consecutive working group meetings would not result in a lesser number of experts travelling to such meetings and would not therefore result in savings on travel costs for delegations. It was further observed that even where the same experts might be able to travel to more than one working group meeting, the length of time that the experts might be required to be away from their duty stations, if working group meetings were to be consecutive, might be too long. Many experts might not be able to afford long periods of absence from their work. Moreover, it was observed that such a practice might encourage States to keep the same experts already attending one working group meeting for the following one, notwithstanding that those experts might not be the appropriate ones, to the detriment of the work of the Commission.

188. The Commission further observed that the holding of consecutive working group meetings would not result in saving on staff travel costs since different members of the UNCITRAL secretariat were normally assigned to service each working group. The members of the secretariat were customarily involved in the preparation of background research studies analysing various aspects of the subject under consideration by the working group to which they were assigned. It was noted that it would be impracticable to assign a member of staff who had not been involved in the preparation of documents relating to

a particular working group to service that working group. The holding of consecutive working group meetings would not therefore result in a reduction in the number of members of the secretariat travelling to such meetings. It was suggested that the Commission should continue to consider its working methods and the rationalization of its work (see para. 187).

189. The Commission was in general agreement with efforts to find ways and means by which assistance could be given to developing countries, in particular to the least developed countries, as well as, on an exceptional basis, to other developing countries that were members of the Commission, at their request, in consultation with the Secretary-General, to enable them to participate in the sessions of the Commission and its working groups. The view was expressed that such assistance would have to be considered in the context of the overall budget. It was also stated that recommendations on the subject might require consideration by the Fifth Committee of the General Assembly.

## B. UNCITRAL Congress on International Trade Law (New York, 18-22 May 1992)

190. The Commission recalled its decision taken at its twenty-fourth session to entrust the Secretariat with the task of organizing, in the context of the current, twenty-fifth, session of the Commission a Congress on International Trade Law. 32/ The Commission also recalled that the Congress was to be a contribution by the Commission to the activities of the United Nations Decade of International Law.

191. The Commission noted with appreciation the preparations by the Secretariat for the Congress, which was to take place during the third week of the Commission's session, that is, from 18 to 22 May 1992. It was noted that, after publishing the preliminary programme for the Congress in January 1992 (A/CN.9/1992/INF.1), the Secretariat had published the final programme on 8 May (A/CN.9/1992/INF.2). The Commission was pleased that participants had been invited to consider the accomplishments achieved in the progressive unification and harmonization of international trade law during the past 25 years and the needs that could be foreseen for the next 25 years. It was appreciated that over 60 speakers from different regions and legal systems would present a panoramic view of developments in major areas of international commercial law, and the Commission expressed gratitude to those speakers for their readiness to contribute to the Congress.

192. It was noted that the sessions of the Congress would be devoted to the following areas: process and value of unification of commercial law; sale of goods; supply of services; payments, credits and banking; electronic data interchange; transport; dispute settlement; and the future role of UNCITRAL. The Commission approved the practice-oriented approach of the Congress in that it would provide to practising lawyers, corporate counsel, ministry officials, judges, arbitrators, teachers of law and other users of uniform legal texts: (a) up-to-date information and practical guidance concerning principal legal texts of universal relevance; (b) an opportunity to express their opinion on the current state of the unification of the laws and rules governing world commerce; and (c) a forum in which to voice their practical needs as a basis for future work by the Commission and other formulating agencies.

## C. Time period for signing a convention

193. It was observed that, in the case of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991), States had been given about one year within which to sign the Convention. It was further observed that signature of a convention was in many States an important step leading towards adherence to a convention. It was pointed out that the process of consultations that had to precede a signature often required more time than one year and that, in future conventions, it would be preferable to provide for a longer period, perhaps two years, for signing them. It was further recommended that the Secretariat, several months before the expiry of the time period for signature, should remind the States of the approaching deadline. Such a reminder might be useful in that it might accelerate the process of consideration of the convention and increase the number of States that would eventually adhere to the convention.

## D. Bibliography

194. The Commission noted with appreciation the bibliography of recent writings related to the work of the Commission (A/CN.9/369).

## E. Date and place of the twenty-sixth session of the Commission

195. It was decided that the Commission would hold its twenty-sixth session from 7 to 25 June 1993 at Vienna.

## F. Sessions of the working groups

196. It was decided that the Working Group on International Contract Practices would hold its eighteenth session from 30 November to 11 December 1992 at Vienna. As to the nineteenth session of the Working Group, the Commission expressed a preference for the session to be held from 19 to 30 April 1993 in New York, although the Commission noted that it might be necessary to hold the session from 12 to 23 April 1993 in New York.

197. The Commission noted that the Working Group on the New International Economic Order would hold its fifteenth session from 22 June to 2 July 1992 in New York. The Working Group expected to complete its preparation of the draft Model Law on Procurement at that session. It was decided that the Working Group might hold its sixteenth session from 5 to 16 October 1992 at Vienna if, in the judgement of the Working Group, its progress in respect of the preparation of the draft Model Law on Procurement so warranted.

198. The Commission, recalling its decision to rename the Working Group on International Payments the Working Group on Electronic Data Interchange to reflect the topic currently being dealt with by the Working Group (see para. 147 above), noted that the Working Group would not hold its session from 31 August to 11 September 1992 in New York as originally planned; instead, the session would be held from 4 to 15 January 1993 in New York.

## Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 17 were elected by the Assembly at its forty-third session on 19 October 1988 (decision 43/307) and 19 were elected at its forty-sixth session on 4 November 1991 (decision 46/309). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-third session will expire on the last day prior to the opening of the twenty-eighth regular annual session of the Commission, in 1995, while the term of those members elected at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1998.

2/ The election of the Chairman took place at the 467th meeting, on 4 May 1992, and the election of the Vice-Chairmen and the Rapporteur took place at the 478th meeting, on 11 May 1992. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect II, para. 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 14 (Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 14)).

3/ United Nations publication, Sales No. E.87.V.9 (A/CN.9/Ser.B/1).

4/ Official Records of the General Assembly, Forty-first Session, Supplement No. 17 (A/41/17), para. 230.

5/ Ibid., Forty-sixth Session, Supplement No. 17 (A/46/117).

6/ Ibid., paras. 278 and 279.

7/ Ibid., para. 158.

8/ Ibid., para. 160.

9/ Ibid., paras. 187 and 188.

10/ Ibid., para. 281.

11/ Ibid., para. 272.

12/ Ibid., paras. 125 and 126.

13/ Ibid., para. 84.

14/ Ibid., para. 222.

15/ Ibid., paras. 154 156.

Notes (continued)

16/ Ibid., para. 108.

17/ Ibid., para. 249.

18/ The articles of the draft Model Law as submitted to the Commission by the Working Group were renumbered upon adoption of the Model Law by the Commission. For the development of the draft articles in the Working Group, see A/CN.9/346.

| Number of article in Model Law | Number of draft article before the Commission | Number of article in Model Law | Number of draft article before the Commission |
|---|---|---|---|
| 1 | 1 | 12(1) | 11(1) |
| | | 12(2) | 11(2) |
| 2(a) | 2(a) | 12(3) | 11(3) |
| 2(b) | 2(b) | 12(4) | 11(4) |
| 2(c) | 2(c) | 12(5) | 11(5) |
| 2(d) | 2(d) | 12(6) | 11(6) |
| 2(e) | 2(e) | 12(7) | 11(6 bis) |
| 2(f) | 2(g) | 12(8) | 11(6 ter) |
| 2(g) | 2(h) | 12(9) | 11(6 bis) |
| 2(h) | 2(i) | 12(10) | 11(7) |
| 2(i) | 2(j) | 12(11) | 11(8) |
| 2(j) | new | 12(12) | 11(8 bis) |
| 2(k) | 2(k) | 12(13) | 11(9) |
| 2(l) | 2(l) | | |
| 2(m) | 2(n) | 13 | 12 |
| 3 | 2 bis | 14 | 13 |
| 4 | 3 | 15 | 14 |
| 5 | 4 | 16 | 15 |
| 6 | 5 | 17(1) | 16(1) |
| | | 17(2) | 16(2) |
| 7 | 6 | 17(3) | new |
| | | 17(4) | 16(3) |
| 8 | 7 | 17(5) | 16(4) |
| | | 17(6) | 16(6) |
| 9 | 8 | 17(7) | 16(7) |
| 10 | 9 | 18 | 16(8) |
| 11(1) | 10(1) | 19(1) | 17(1) |
| 11(2) | 10(1 bis) | 19(2) | 17(3) |
| 11(3) | 10(1 ter) | | |
| 11(4) | 10(2) | Y (note to chapter I) | 18 |
| 11(5) | 10(4) | | |
| 11(6) | 10(5) | | |
| 11(7) | 10(6) | note to article 19 | 17(2) |

Notes (continued)

19/ Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 32-35.

20/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 245-249.

21/ Ibid., Forty-fifth Session, Supplement No. 17 (A/45/17).

22/ Ibid., para. 16.

23/ Ibid., paras. 17 and 18.

24/ Ibid., Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 314-317.

25/ Ibid., Forty-first Session, Supplement No. 17 (A/41/17), para. 243.

26/ Ibid., Forty-fourth Session, Supplement No. 17 (A/44/17), para. 244.

27/ Ibid., Forty-third Session, Supplement No. 17 (A/43/17), paras. 98-109.

28/ Ibid., Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

29/ Ibid., Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 109.

30/ Ibid., Forty-sixth Session, Supplement No. 17, para. 338.

31/ Ibid., para. 337.

32/ Ibid., paras. 343-349.

ANNEX I

[Original: Arabic, Chinese, English, French, Russian, Spanish]

# UNCITRAL Model Law on International Credit Transfers

## CHAPTER I. GENERAL PROVISIONS*

### Article 1

### Sphere of application**

(1) This law applies to credit transfers where any sending bank and its receiving bank are in different States.

(2) This law applies to other entities that as an ordinary part of their business engage in executing payment orders in the same manner as it applies to banks.

(3) For the purpose of determining the sphere of application of this law, branches and separate offices of a bank in different States are separate banks.

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* The Commission suggests the following text for States that might wish to adopt it:

### Article Y

### Conflict of laws

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender.

(3) For the purposes of this article:

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State;

(b) branches and separate offices of a bank in different States are separate banks.

** This law does not deal with issues related to the protection of consumers.

## Article 2

## Definitions

For the purposes of this law:

(a) "Credit transfer" means the series of operations, beginning with the originator's payment order, made for the purpose of placing funds at the disposal of a beneficiary. The term includes any payment order issued by the originator's bank or any intermediary bank intended to carry out the originator's payment order. A payment order issued for the purpose of effecting payment for such an order is considered to be part of a different credit transfer;

(b) "Payment order" means an unconditional instruction, in any form, by a sender to a receiving bank to place at the disposal of a beneficiary a fixed or determinable amount of money if

(i) the receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender, and

(ii) the instruction does not provide that payment is to be made at the request of the beneficiary.

Nothing in this paragraph prevents an instruction from being a payment order merely because it directs the beneficiary's bank to hold, until the beneficiary requests payment, funds for a beneficiary that does not maintain an account with it;

(c) "Originator" means the issuer of the first payment order in a credit transfer;

(d) "Beneficiary" means the person designated in the originator's payment order to receive funds as a result of the credit transfer;

(e) "Sender" means the person who issues a payment order, including the originator and any sending bank;

(f) "Receiving bank" means a bank that receives a payment order;

(g) "Intermediary bank" means any receiving bank other than the originator's bank and the beneficiary's bank;

(h) "Funds" or "money" includes credit in an account kept by a bank and includes credit denominated in a monetary unit of account that is established by an intergovernmental institution or by agreement of two or more States, provided that this law shall apply without prejudice to the rules of the intergovernmental institution or the stipulations of the agreement;

(i) "Authentication" means a procedure established by agreement to determine whether a payment order or an amendment or revocation of a payment order was issued by the person indicated as the sender;

(j) "Banking day" means that part of a day during which the bank performs the type of action in question;

(k) "Execution period" means the period of one or two days beginning on the first day that a payment order may be executed under article 11(1) and ending on the last day on which it may be executed under that article;

(l) "Execution", in so far as it applies to a receiving bank other than the beneficiary's bank, means the issue of a payment order intended to carry out the payment order received by the receiving bank;

(m) "Interest" means the time value of the funds or money involved, which, unless otherwise agreed, is calculated at the rate and on the basis customarily accepted by the banking community for the funds or money involved.

Article 3

Conditional instructions

(1) When an instruction is not a payment order because it is subject to a condition but a bank that has received the instruction executes it by issuing an unconditional payment order, thereafter the sender of the instruction has the same rights and obligations under this law as the sender of a payment order and the beneficiary designated in the instruction shall be treated as the beneficiary of a payment order.

(2) This law does not govern the time of execution of a conditional instruction received by a bank, nor does it affect any right or obligation of the sender of a conditional instruction that depends on whether the condition has been satisfied.

Article 4

Variation by agreement

Except as otherwise provided in this law, the rights and obligations of parties to a credit transfer may be varied by their agreement.

CHAPTER II. OBLIGATIONS OF THE PARTIES

Article 5

Obligations of sender

(1) A sender is bound by a payment order or an amendment or revocation of a payment order if it was issued by the sender or by another person who had the authority to bind the sender.

(2) When a payment order or an amendment or revocation of a payment order is subject to authentication other than by means of a mere comparison of signature, a purported sender who is not bound under paragraph (1) is nevertheless bound if

(a) the authentication is in the circumstances a commercially reasonable method of security against unauthorized payment orders, and

(b) the receiving bank complied with the authentication.

(3) The parties are not permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the payment order as received by the receiving bank resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the receiving bank proves that the payment order resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by a payment order is bound by the terms of the order as received by the receiving bank. However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a payment order if

(a) the sender and the receiving bank have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a payment order, and

(b) use of the procedure by the receiving bank revealed or would have revealed the erroneous duplicate, error or discrepancy.

If the error or discrepancy that the bank would have detected was that the sender instructed payment of an amount greater than the amount intended by the sender, the sender is bound only to the extent of the amount that was intended. Paragraph (5) applies to an error or discrepancy in an amendment or a revocation order as it applies to an error or discrepancy in a payment order.

(6) A sender becomes obligated to pay the receiving bank for the payment order when the receiving bank accepts it, but payment is not due until the beginning of the execution period.

## Article 6

## Payment to receiving bank

For the purposes of this law, payment of the sender's obligation under article 5(6) to pay the receiving bank occurs

(a) if the receiving bank debits an account of the sender with the receiving bank, when the debit is made; or

(b) if the sender is a bank and subparagraph (a) does not apply,

(i) when a credit that the sender causes to be entered to an account of the receiving bank with the sender is used or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(ii) when a credit that the sender causes to be entered to an account of the receiving bank in another bank is used or, if not used, on the banking day following the day on which the credit is available for use and the receiving bank learns of that fact, or

(iii) when final settlement is made in favour of the receiving bank at a central bank at which the receiving bank maintains an account, or

(iv) when final settlement is made in favour of the receiving bank in accordance with

a. the rules of a funds transfer system that provides for the settlement of obligations among participants either bilaterally or multilaterally, or

b. a bilateral netting agreement with the sender; or

(c) if neither subparagraph (a) nor (b) applies, as otherwise provided by law.

Article 7

Acceptance or rejection of a payment order by receiving bank other than the beneficiary's bank

(1) The provisions of this article apply to a receiving bank other than the beneficiary's bank.

(2) A receiving bank accepts the sender's payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt;

(b) when the bank gives notice to the sender of acceptance;

(c) when the bank issues a payment order intended to carry out the payment order received;

(d) when the bank debits an account of the sender with the bank as payment for the payment order; or

(e) when the time for giving notice of rejection under paragraph (3) has elapsed without notice having been given.

(3) A receiving bank that does not accept a payment order is required to give notice of rejection no later than on the banking day following the end of the execution period, unless:

(a) where payment is to be made by debiting an account of the sender with the receiving bank, there are insufficient funds available in the account to pay for the payment order;

(b) where payment is to be made by other means, payment has not been made; or

(c) there is insufficient information to identify the sender.

(4) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

Article 8

Obligations of receiving bank other than the beneficiary's bank

(1) The provisions of this article apply to a receiving bank other than the beneficiary's bank.

(2) A receiving bank that accepts a payment order is obligated under that payment order to issue a payment order, within the time required by article 11, either to the beneficiary's bank or to an intermediary bank, that is consistent with the contents of the payment order received by the receiving bank and that contains the instructions necessary to implement the credit transfer in an appropriate manner.

(3) A receiving bank that determines that it is not feasible to follow an instruction of the sender specifying an intermediary bank or funds transfer system to be used in carrying out the credit transfer, or that following such an instruction would cause excessive costs or delay in completing the credit transfer, shall be taken to have complied with paragraph (2) if, before the end of the execution period, it inquires of the sender what further actions it should take.

(4) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient lata, but the sender can be identified, the receiving bank shall give notice to the sender of the insufficiency, within the time required by article 11.

(5) When a receiving bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 11, give notice to the sender of the inconsistency, if the sender can be identified. Any interest payable under article 17(4) for failing to give the notice required by this paragraph shall be deducted from any interest payable under article 17(1) for failing to comply with paragraph (2) of this article.

(6) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

Article 9

Acceptance or rejection of a payment order by beneficiary's bank

(1) The beneficiary's bank accepts a payment order at the earliest of the following times:

(a) when the bank receives the payment order, provided that the sender and the bank have agreed that the bank will execute payment orders from the sender upon receipt;

(b) when the bank gives notice to the sender of acceptance;

(c) when the bank debits an account of the sender with the bank as payment for the payment order;

(d) when the bank credits the beneficiary's account or otherwise places the funds at the disposal of the beneficiary;

(e) when the bank gives notice to the beneficiary that it has the right to withdraw the funds or use the credit;

(f) when the bank otherwise applies the credit as instructed in the payment order;

(g) when the bank applies the credit to a debt of the beneficiary owed to it or applies it in conformity with an order of a court or other competent authority; or

(h) when the time for giving notice of rejection under paragraph (2) has elapsed without notice having been given.

(2) A beneficiary's bank that does not accept a payment order is required to give notice of rejection no later than on the banking day following the end of the execution period, unless:

(a) where payment is to be made by debiting an account of the sender with the beneficiary's bank, there are insufficient funds available in the account to pay for the payment order;

(b) where payment is to be made by other means, payment has not been made; or

(c) there is insufficient information to identify the sender.

(3) A payment order ceases to have effect if it is neither accepted nor rejected under this article before the close of business on the fifth banking day following the end of the execution period.

## Article 10

### Obligations of beneficiary's bank

(1) The beneficiary's bank is, upon acceptance of a payment order, obligated to place the funds at the disposal of the beneficiary, or otherwise to apply the credit, in accordance with the payment order and the law governing the relationship between the bank and the beneficiary.

(2) When an instruction is received that appears to be intended to be a payment order but does not contain sufficient data to be a payment order, or being a payment order it cannot be executed because of insufficient data, but the sender can be identified, the beneficiary's bank shall give notice to the sender of the insufficiency, within the time required by article 11.

(3) When the beneficiary's bank detects that there is an inconsistency in the information relating to the amount of money to be transferred, it shall, within the time required by article 11, give notice to the sender of the inconsistency if the sender can be identified.

(4) When the beneficiary's bank detects that there is an inconsistency in the information intended to identify the beneficiary, it shall, within the time required by article 11, give notice to the sender of the inconsistency if the sender can be identified.

(5) Unless the payment order states otherwise, the beneficiary's bank shall, within the time required for execution under article 11, give notice to a beneficiary who does not maintain an account at the bank that it is holding funds for its benefit, if the bank has sufficient information to give such notice.

## Article 11

### Time for receiving bank to execute payment order and give notices

(1) In principle, a receiving bank that is obligated to execute a payment order is obligated to do so on the banking day it is received. If it does not, it shall do so on the banking day after the order is received. Nevertheless, if

(a) a later date is specified in the payment order, the payment order shall be executed on that date, or

(b) the payment order specifies a date when the funds are to be placed at the disposal of the beneficiary and that date indicates that later execution is appropriate in order for the beneficiary's bank to accept a payment order and execute it on that date, the order shall be executed on that date.

(2) If the receiving bank executes the payment order on the banking day after it is received, except when complying with subparagraph (a) or (b) of paragraph (1), the receiving bank must execute for value as of the day of receipt.

(3) A receiving bank that becomes obligated to execute a payment order by virtue of accepting a payment order under article 7(2)(e) must execute for value as of the later of the day on which the payment order is received and the day on which

(a) where payment is to be made by debiting an account of the sender with the receiving bank, there are sufficient funds available in the account to pay for the payment order, or

(b) where payment is to be made by other means, payment has been made.

(4) A notice required to be given under article 8(4) or (5) or article 10(2), (3) or (4) shall be given on or before the banking day following the end of the execution period.

(5) A receiving bank that receives a payment order after the receiving bank's cut-off time for that type of payment order is entitled to treat the order as having been received on the next day the bank executes that type of payment order.

(6) If a receiving bank is required to perform an action on a day when it does not perform that type of action, it must perform the required action on the next day it performs that type of action.

(7) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

## Article 12

## Revocation

(1) A payment order may not be revoked by the sender unless the revocation order is received by a receiving bank other than the beneficiary's bank at a time and in a manner sufficient to afford the receiving bank a reasonable opportunity to act before the later of the actual time of execution and the beginning of the day on which the payment order ought to have been executed under subparagraph (a) or (b) of article 11(1).

(2) A payment order may not be revoked by the sender unless the revocation order is received by the beneficiary's bank at a time and in a manner sufficient to afford the bank a reasonable opportunity to act before the later of the time the credit transfer is completed and the beginning of the day when the funds are to be placed at the disposal of the beneficiary.

(3) Notwithstanding the provisions of paragraphs (1) and (2), the sender and the receiving bank may agree that payment orders issued by the sender to the receiving bank are to be irrevocable or that a revocation order is effective only if it is received earlier than the time specified in paragraph (1) or (2).

(4) A revocation order must be authenticated.

(5) A receiving bank other than the beneficiary's bank that executes, or a beneficiary's bank that accepts, a payment order in respect of which an effective revocation order has been or is subsequently received is not entitled to payment for that payment order. If the credit transfer is completed, the bank shall refund any payment received by it.

(6) If the recipient of a refund is not the originator of the credit transfer, it shall pass on the refund to its sender.

(7) A bank that is obligated to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender. Any bank subsequent to that prior sender is discharged to the same extent.

(8) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

(9) Paragraphs (7) and (8) do not apply to a bank if they would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system.

(10) If the credit transfer is completed but a receiving bank executes a payment order in respect of which an effective revocation order has been or is subsequently received, the receiving bank has such rights to recover from the beneficiary the amount of the credit transfer as may otherwise be provided by law.

(11) The death, insolvency, bankruptcy or incapacity of either the sender or the originator does not of itself operate to revoke a payment order or terminate the authority of the sender.

(12) The principles contained in this article apply to an amendment of a payment order.

(13) For the purposes of this article, branches and separate offices of a bank, even if located in the same State, are separate banks.

## CHAPTER III. CONSEQUENCES OF FAILED, ERRONEOUS OR DELAYED CREDIT TRANSFERS

### Article 13

### Assistance

Until the credit transfer is completed, each receiving bank is requested to assist the originator and each subsequent sending bank, and to seek the assistance of the next receiving bank, in completing the banking procedures of the credit transfer.

## Article 14

### Refund

(1) If the credit transfer is not completed, the originator's bank is obligated to refund to the originator any payment received from it, with interest from the day of payment to the day of refund. The originator's bank and each subsequent receiving bank is entitled to the return of any funds it has paid to its receiving bank, with interest from the day of payment to the day of refund.

(2) The provisions of paragraph (1) may not be varied by agreement except when a prudent originator's bank would not have otherwise accepted a particular payment order because of a significant risk involved in the credit transfer.

(3) A receiving bank is not required to make a refund under paragraph (1) if it is unable to obtain a refund because an intermediary bank through which it was directed to effect the credit transfer has suspended payment or is prevented by law from making the refund. A receiving bank is not considered to have been directed to use the intermediary bank unless the receiving bank proves that it does not systematically seek such directions in similar cases. The sender that first specified the use of that intermediary bank has the right to obtain the refund from the intermediary bank.

(4) A bank that is obligated to make a refund to its sender is discharged from that obligation to the extent that it makes the refund direct to a prior sender. Any bank subsequent to that prior sender is discharged to the same extent.

(5) An originator entitled to a refund under this article may recover from any bank obligated to make a refund hereunder to the extent that the bank has not previously refunded. A bank that is obligated to make a refund is discharged from that obligation to the extent that it makes the refund direct to the originator. Any other bank that is obligated is discharged to the same extent.

(6) Paragraphs (4) and (5) do not apply to a bank if they would affect the bank's rights or obligations under any agreement or any rule of a funds transfer system.

## Article 15

### Correction of underpayment

If the amount of the payment order executed by a receiving bank is less than the amount of the payment order it accepted, other than as a result of the deduction of its charges, it is obligated to issue a payment order for the difference.

## Article 16

### Restitution of overpayment

If the credit transfer is completed, but the amount of the payment order executed by a receiving bank is greater than the amount of the payment order it accepted, it has such rights to recover the difference from the beneficiary as may otherwise be provided by law.

## Article 17

### Liability for interest

(1) A receiving bank that does not comply with its obligations under article 8(2) is liable to the beneficiary if the credit transfer is completed. The liability of the receiving bank is to pay interest on the amount of the payment order for the period of delay caused by the receiving bank's non-compliance. If the delay concerns only part of the amount of the payment order, the liability shall be to pay interest on the amount that has been delayed.

(2) The liability of a receiving bank under paragraph (1) may be discharged by payment to its receiving bank or by direct payment to the beneficiary. If a receiving bank receives such payment but is not the beneficiary, the receiving bank shall pass on the benefit of the interest to the next receiving bank or, if it is the beneficiary's bank, to the beneficiary.

(3) An originator may recover the interest the beneficiary would have been entitled to, but did not, receive in accordance with paragraphs (1) and (2) to the extent the originator has paid interest to the beneficiary on account of a delay in the completion of the credit transfer. The originator's bank and each subsequent receiving bank that is not the bank liable under paragraph (1) may recover interest paid to its sender from its receiving bank or from the bank liable under paragraph (1).

(4) A receiving bank that does not give a notice required under article 8(4) or (5) shall pay interest to the sender on any payment that it has received from the sender under article 5(6) for the period during which it retains the payment.

(5) A beneficiary's bank that does not give a notice required under article 10(2), (3) or (4) shall pay interest to the sender on any payment that it has received from the sender under article 5(6), from the day of payment until the day that it provides the required notice.

(6) The beneficiary's bank is liable to the beneficiary to the extent provided by the law governing the relationship between the beneficiary and the bank for its failure to perform one of the obligations under article 10(1) or (5).

(7) The provisions of this article may be varied by agreement to the extent that the liability of one bank to another bank is increased or reduced. Such an agreement to reduce liability may be contained in a bank's standard terms

of dealing. A bank may agree to increase its liability to an originator or beneficiary that is not a bank, but may not reduce its liability to such an originator or beneficiary. In particular, it may not reduce its liability by an agreement fixing the rate of interest.

### Article 18

### Exclusivity of remedies

The remedies in article 17 shall be exclusive, and no other remedy arising out of other doctrines of law shall be available in respect of non-compliance with articles 8 or 10, except any remedy that may exist when a bank has improperly executed, or failed to execute, a payment order (a) with the specific intent to cause loss, or (b) recklessly and with actual knowledge that loss would be likely to result.

## CHAPTER IV. COMPLETION OF CREDIT TRANSFER

### Article 19

### Completion of credit transfer***

(1) A credit transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. When the credit transfer is completed, the beneficiary's bank becomes indebted to the beneficiary to the extent of the payment order accepted by it. Completion does not otherwise affect the relationship between the beneficiary and the beneficiary's bank.

(2) A credit transfer is completed notwithstanding that the amount of the payment order accepted by the beneficiary's bank is less than the amount of the originator's payment order because one or more receiving banks have deducted charges. The completion of the credit transfer shall not prejudice any right of the beneficiary under the applicable law governing the underlying obligation to recover the amount of those charges from the originator.

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*** The Commission suggests the following text for States that might wish to adopt it:

> If a credit transfer was for the purpose of discharging an obligation of the originator to the beneficiary that can be discharged by credit transfer to the account indicated by the originator, the obligation is discharged when the beneficiary's bank accepts the payment order and to the extent that it would be discharged by payment of the same amount in cash.

ANNEX II

List of documents before the Commission at its twenty-fifth session

A. General series

| | |
|---|---|
| A/CN.9/355 | Provisional agenda |
| A/CN.9/356 | Report of the Working Group on the New International Economic Order on the work of its thirteenth session |
| A/CN.9/357 | Report of the Working Group on International Payments on the work of its twenty-third session |
| A/CN.9/358 | Report of the Working Group on International Contract Practices on the work of its sixteenth session |
| A/CN.9/359 | Report of the Working Group on the New International Economic Order on the work of its fourteenth session |
| A/CN.9/360 | Report of the Working Group on International Payments on the work of its twenty-fourth session |
| A/CN.9/361 | Report of the Working Group on International Contract Practices on the work of its seventeenth session |
| A/CN.9/362 and Add.1-Add.17 | Draft chapters of Legal Guide on International Countertrade Transactions |
| A/CN.9/363 | Training and assistance |
| A/CN.9/364 | Coordination of work |
| A/CN.9/367 | Draft Model Law on International Credit Transfers |
| A/CN.9/368 | Status of Conventions |
| A/CN.9/369 | Bibliography of recent writings related to the work of UNCITRAL |

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| A/CN.9/XXV/CRP.1 and Add.1-13 | Draft report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session |
| A/CN.9/XXV/CRP.2 and Add.1 | Report of the drafting group |

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| A/CN.9/XXV/CRP.3 | International Countertrade (draft Legal Guide on International Countertrade Transactions; draft decision by the Commission) |
| A/CN.9/XXV/CRP.4 | International Countertrade (suggested addition to chapter VI) |
| A/CN.9/XXV/CRP.5 | Suggested draft decision endorsing INCOTERMS 1990 |

C. Information series

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|---|---|
| A/CN.9/XXV/INF.1 | Provisional list of participants |
| A/CN.9/XXV/INF.1/Rev.1 | List of participants |

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